TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1944

No. 20

WILLIAM F. ESENWEIN, PETITIONER,

vs.

COMMONWEALTH EX REL. MAY H. ESENWEIN

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF PENNSYLVANIA

PETITION FOR CERTIORARI FILED FEBRUARY 3, 1944.

CERTIORARI GRANTED JUNE 12, 1944.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No.

WILLIAM F. ESENWEIN, PETITIONER,

vs.

COMMONWEALTH OF PENNSYLVANIA, EX REL. MAY H. ESENWEIN

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE COMMONWEALTH OF PENNSYLVANIA

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[fol. 1]

IN COUNTY COURT OF ALLEGHENY COUNTY

DOCKET ENTRIES

Charge: Desertion and Non Support.

March 13, 1922, Information made on oath of May H. Esenwein, wife of defendant. Hearing fixed for March 20, 1922.

Eo die, Probation Officer's notice to defendant to appear exit.

March 20, 1922, after hearing, formal order made requiring defendant to pay wife $150.00 per month. Pay $25.00 cash. Order to start April 1, 1922. Defendant to enter own recognizance in the sum of $1000.00 to comply.

Oct. 3, 1922, rule granted on prosecutrix to show cause why order should not be vacated or decreased; returnable Oct. 10, 1922.

Oct. 10, 1922, order modified and formal order made requiring defendant to pay wife $20.00 per week and enter own recognizance in the sum of $1000.00.

Jan. 29, 1923, rule granted on prosecutrix to show cause why order should not be reduced or vacated; returnable Feb. 6, 1923.

Feb. 6, 1923, after hearing, rule discharged. County pay costs.

July 29, 1924, Petition for re-hearing filed by prosecutrix.

Sept. 4, 1924, answer to petition filed.

[fol. 2] Sept. 9, 1924, order modified, formal order made requiring defendant to pay wife $100.00 per month and $50.00 per month extra during the months of July and August. Defendant to enter his own recognizance in the sum of $1000.00.

Jan. 11, 1927, rule granted on defendant to show cause why re-hearing should not be granted; returnable Jan. 20, 1927.

Jan. 18, 1927, answer filed.

Jan. 20, 1927, order modified and formal order made requiring defendant to pay wife $160.00 per month and enter own recognizance in the sum of $2000.00.

March 22, 1928, Petition presented in Open Court and rule granted on defendant to show cause why he should not be attached; returnable March 26, 1928.

Eo die, Service of rule accepted by Addison Lyon, attorney for defendant.

March 26, 1928, on trial list and case continued.

Nov. 24, 1931, rule granted on defendant to show cause why he should not be attached; returnable Dec. 14, 1931.

Dec. 14, 1931, parties not appearing, rule discharged. County pay costs.

Feb. 16, 1932, rule granted on prosecutrix to show cause why order should not be vacated; returnable March 1, 1932. Certified copy of divorce decree filed.

[fol. 3] Feb. 25, 1932, rule granted on defendant to show cause why he should not be attached; returnable March 1, 1932.

And now March 9, 1932, the within rule to vacate order discharged. Opinion filed.

Eo die, on rule to show cause, rule absolute and attachment in contempt directed to issue. Opinion filed.

Nov. 25, 1933, rule granted on prosecutrix to show cause why order should not be vacated or reduced; returnable Dec. 7, 1933.

Dec. 7, 1933, after hearing, rule discharged. County pay costs.

March 1, 1934, rule granted on prosecutrix to show cause why order should not be reduced; returnable March 8, 1934.

March 8, 1934, after hearing, order modified, requiring defendant to pay $130.00 per month. Recognizance heretofore entered to remain in force. County pay costs.

March 8, 1939, rule granted upon defendant to show cause why order for support should not be increased; returnable March 22, 1939.

March 31, 1939, modified order made requiring defendant to pay $150.00 per month for a period of four months (July 31, 1939) at which time the order for support shall automatically revert to $130.00 per month. Recognizance [fol. 4] heretofore entered to remain in force. Defendant to pay costs $6.25 (McKim, P. J.).

Jan. 20, 1940, the foregoing petition presented in open Court and upon consideration thereof and on motion of Fred C. Houston, attorney for the petitioner, a rule is granted on

the said May H. Esenwein, respondent to show cause why the order for support entered on March 8, 1939 should not be vacated and the records of this case marked closed. Returnable Jan. 29, 1940 at 9:30 o'clock A. M.

Feb. 1, 1940, answer of May H. Esenwein to petition to vacate order and rule to show cause filed.

Feb. 1, 1940, continued to Feb. 6, 1940.

Feb. 6, 1940, on trial list and continued to Feb. 20, 1940.

Feb. 20, 1940, on trial list and continued.

Sept. 24, 1940, rule granted on defendant to show cause why order for support should not be increased; returnable Oct. 1, 1940.

Sept. 30, 1940, continued to Oct. 9, 1940.

Oct. 9, 1940, on trial list and continued.

Oct. 11, 1940, rule granted on prosecutrix to show cause the order should not be reduced; returnable Oct. 15, 1940 at 2:00 P. M.

Jan. 6, 1941, order modified requiring defendant to pay $150.00 per month. Recognizance heretofore entered to remain in force. County pay costs. To which order de-[fol. 5] fendant's counsel, Fred C. Houston, excepts. Exception noted and bill sealed (McKim, P. J.).

July 29, 1941, on Order of Court (McKim, P. J.) leave granted Alter, Wright and Barron and James G. Fulton to withdraw their appearance as counsel for May H. Esenwein, prosecutrix.

Oct. 22, 1941, rule granted upon defendant to show cause why he should not be attached; returnable Nov. 12, 1941.

Nov. 12, 1941, on trial list, case continued to Nov. 19, 1941.

Nov. 19, 1941, on trial list and continued to Nov. 25, 1941.

Nov. 25, 1941, on trial list, case called and parties not appearing, rule discharged. County pay costs (Lencher, J.)

Feb. 16, 1942, rule granted on defendant to show cause why he should not be attached; returnable March 4, 1942.

March 4, 1942, on trial list, case continued to March 11, 1942.

March 11, 1942, on trial list and case called, defendant's whereabouts unknown, rule continued indefinitely. County pay costs.

April 7, 1942, on petition, rule granted upon defendant to show cause why arrearages in the sum of $675.00 should not [fol. 6] be reduced to a judgment; returnable April 22, 1942 (McKim, P. J.).

April 22, 1942, on trial list, case called and parties not appearing, rule discharged. County pay costs (McKim, P. J.).

July 22, 1942, on petition, rule granted upon prosecutrix to show cause why order should not be reduced; returnable Sept. 30, 1942, and commission issued to Roy C. Green, Esq., of Cleveland, Ohio to take oral testimony of Wm. F. Esenwein.

Ex die, commission exit (Pd. $1.75) McKim, P. J.

Sept. 22, 1942, rule granted on defendant to show cause why he should not be attached; returnable Sept. 30, 1942.

Sept. 29, 1942, at request of Attorney Fred C. Houston, Esq., for petitioner, Return Day is extended to Nov. 10, 1942 (McKim, P. J.).

Nov. 4, 1942, order extending Return Day filed; returnable Dec. 8, 1942 (McKim, P. J.).

Nov. 28, 1942, Commission and Interrogatories returned by Commissioner and filed. Commissioner's fee not stated. Counsel notified.

Dec. 8, 1942, and now to-wit, after the offer of depositions by the defendant and no further testimony offered by prosecutrix, the Court under its discretion reduces the arrearages from $1625.00 to $1000.00 and makes an order as of this date that the defendant pay prosecutrix $75.00 [fol. 7] a month. The $1000.00 to be paid in one payment on or before the 15th day of December; this payment is in lieu of all arrearages up to the date of this Order. County pay costs. (By the Court, McKim, P. J.).

Jan. 27, 1943, rule granted on defendant to show cause why he should not be attached; returnable Feb. 10, 1943.

Feb. 1, 1943, petition presented in open Court upon prosecutrix to show cause why order of Court should not be revocated; returnable Feb. 11, 1943.

Feb. 8, 1943, defendant's answer to rule filed.

Feb. 10, 1943, on trial list and continued to Feb. 18, 1943.

Feb. 17, 1943, answer to petition for revocation of support order and acceptance of service filed.

Feb. 18, 1943, on trial list and continued to Feb. 26, 1943.

Feb. 26, 1943, petition for amendment of petition for revocation of order for support and for other relief filed.

Feb. 26, 1943, the above entitled case came on for hearing on the petition for the revocation of the Order for support (as amended) and on the rule on defendant to show cause why he should not be attached for failure to comply with the Order for support, and after hearing, it is ordered that the original petition for the revocation of the Order for [fol. 8] support (and as amended) is refused and the rule on defendant to show cause why he should not be attached for failure to comply with the order for support is made absolute. County pay costs (Gunther, J.).

March 5, 1943, Certiorari to Superior Court filed by defendant at 233 April Term, 1943, returnable the 3rd Monday of April, 1943 from order of date Dec. 8, 1942.

March 5, 1943, Certiorari to Superior Court filed by defendant at #234 April Term, 1943, returnable the 3rd Monday of April, 1943 from the order entered under date of Feb. 26, 1943 refusing defendant's prayer for the opening of the Order of Dec. 8, 1942.

March 5, 1943, Certiorari to Superior Court filed by the defendant at #235 April Term, 1943, returnable the 3rd Monday of April, 1943 from the order of Feb. 26, 1943 refusing defendant's prayer for the vacation of the order of Dec. 8, 1942 and making absolute rule of prosecutrix for attachment.

March 8, 1943, transcript of testimony filed showing stenographic fee of C. E. Urban in the sum of $7.60 chargeable to Allegheny County.

March 26, 1943, Opinion filed.

Certified from the Record.

Wm. H. Frasher, Clerk of County Court. (Seal.)

[fol. 9] In County Court of Allegheny County

Petition for Reduction—Filed Nov. 12, 1942

To the Honorable, The Judges of said Court:

The petition of William F. Esenwein respectfully shows:

First. That on January 26, 1941, your petitioner, at the above number, was ordered to pay to May H. Esenwein, the prosecutrix, the sum of One Hundred Fifty ($150.00) Dollars per month.

Second. That during the month of June, 1941, petitioner sold his interest in his business in the City of Pittsburgh, Allegheny County, Pennsylvania, and since that time has been unemployed.

Third. That on or about June 30, 1941, petitioner became the resident of the State of Nevada, residing in the City of Las Vegas in said State.

Fourth: That on or about August 5, 1941 your petitioner filed a suit in divorce against the said May H. Esenwein in the Eighth Judicial Court of the State of Nevada.

Fifth. That May H. Esenwein, the defendant in said action, was served personally with the summons issued by said court, but failed to appear, plead or answer said suit within the time provided by law.

Sixth. That on September 8, 1941, the said court entered a decree in divorce which read in part as follows:

[fol. 10] "It is ordered, adjudged, and decreed, that the bonds of matrimony now and heretofore existing between the plaintiff, William F. Esenwein, and the defendant, May H. Esenwein, be, and the same are hereby wholly dissolved and a decree of absolute divorce is hereby granted plaintiff and each of the parties hereto are hereby restored to the status of single persons."

Seventh. That on or about October 18, 1941, petitioner became a resident of the State of Ohio and at the present time resides in the City of Cleveland in said State.

Eight. That petitioner's sole income since June, 1941 has been from his investments and for the first six months of 1942 amounted to $1,788.09.

Ninth. That the present order entered by your Honorable Court on January 26, 1941 is greatly in excess of one-third of petitioner's income and should be reduced *nunc pro tunc* as of January 1, 1942.

Tenth. That at the present time there are arrearages of approximately $800.00.

Wherefore, petitioner prays as follows:

A. That the arrearages which have accrued under the order of January 26, 1941 be remitted.

B. That the present order for support to the said May H. Esenwein be reduced to such amount as your Honorable Court may deem meet and proper.

[fol. 11] C. That a commission issue to Roy C. Green, Esq., of Cleveland, Ohio, authorizing him to take the deposition of your petitioner on oral examination.

And petitioner will ever pray, etc.

William F. Esenwein.

Duly sworn to by William F. Esenwein. Jurat omitted in printing.

In County Court of Allegheny County

Order Granting Rule

And now, July 22nd, 1942, the foregoing petition having been presented in open court, upon consideration thereof a rule is granted on the said May H. Esenwein to show cause why the prayer of the petitioner should not be granted, returnable the 30th day of Sept., 1942, service to be made on the prosecutrix either personally or by registered mail [fol. 12] directed to her last known address.

It is further ordered that a commission issue to Roy C. Green, Esq., of Cleveland Ohio, authorizing him to take the deposition of William F. Esenwein, the petitioner, on oral examination.

By the Court, McKim, P. J.

IN THE COUNTY COURT OF ALLEGHENY COUNTY, PENNSYLVANIA

No. 287—1922

COMMONWEALTH *ex rel.* MAY H. ESENWEIN

vs.

WILLIAM F. ESENWEIN

(Desertion and Non-support)

Hearing of December 8, 1942

Before Hon. Samuel J. McKim, P. J.

Tuesday, December 8, 1942—3:30 P. M.

Counsel Present:

N. J. Lippard, Esq., for Prosecutrix,

Fred C. Houston, Esq., for Defendant

Hearing on Prosecutrix' petition for arrearages, and also Defendant's petition for a reduction. Prosecutrix present together with counsel; Defendant not appearing but represented by Counsel.

[Tol. 13] *Mr. Houston:*

Counsel for William F. Esenwein offers in evidence the written deposition of respondent, which was taken in an oral examination on November 19, 1942, at Room 1857, Union Commerce Building, Cleveland, Ohio, at which hearing both parties were represented by Counsel. This deposition is offered in support of the petition of William F. Esenwein, the respondent, in which he asks for a reduction in the Order and remission of arrearages.

Mr. Lippard:

No objection to the offer being made, but with one addition. Counsel for the prosecutrix assuming that the testimony given by the defendant at Cleveland is correct. If, however, it is found that the income is far greater than is enumerated in the testimony, plaintiff may again be heard in the matter.

IN COUNTY COURT ALLEGHENY COUNTY

ORDER REDUCING ARREARAGES, ETC.

And now, to-wit December 8th, 1942, after the offer of depositions by the defendant, and no further testimony offered by prosecutrix, the Court under its discretion reduces the arrearages from $1625.00 to $1000.00, and makes an Order as of this date that the defendant pay prosecutrix $75.00 a month. The $1,000.00 to be paid in one payment on or before the 15th of December; this payment is in lieu of all arrearages, up to the date of this Order. County to pay costs.

By the Court, McKinn, P. J.

[fol. 14] IN COUNTY COURT OF ALLEGHENY COUNTY

PETITION FOR ATTACHMENT—Filed January 27, 1943

To the Honorable, the Judges of said Court;

The petition of May H. Esenwein respectfully shows

That on the Mod: 8th day of December, 1942, the above-named defendant at above number, was ordered to pay your petitioner the sum of Seventy-five Dollars per month, with which order he has failed to comply, so that now he is in arrears to the extent of One hundred twelve and 50/100 ($112.50) Dollars due January 23rd, 1943.

Whereupon your petitioner prays that the said defendant may be adjudged in contempt, and that an attachment may issue and that he be arrested and committed until he shall have purged himself of said contempt by the payment of all arrears, and compliance with such further conditions as the Court may impose.

And petitioner will ever pray, etc.

May H. Esenwein.

Duly sworn to by May H. Esenwein. Jurat omitted in printing.

[fol. 15] In County Court of Allegheny County

Order Granting Rule

And now, to-wit, Jan. 27, 1943, a rule is granted upon said defendant to show cause why he should not be attached for contempt in failing to comply with terms of the order of the Court at above number.

Returnable the 10th day of Feb., 1943, at 9:30 o'clock A. M.

Lencher, J.

In County Court of Allegheny County

Petition for Revocation of Order of Support—Filed Feb. 1, 1943.

To the Honorable, the Judges of Said Court:

The petition of William F. Esenwein respectfully represents:

First. This proceeding was commenced by the above named prosecutrix to compel petitioner as her husband to contribute to her support. As the clerk's docket entries show, the order as originally entered has been frequently modified. The most recent order was entered under date of December 8, 1942, whereby arrearages in payment were reduced to One Thousand Dollars ($1,000.00) and the monthly rate reduced to Seventy-Five Dollars ($75.00). Petitioner has paid the said sum of One Thousand Dollars ($1,000.00).

Second. Shortly after the entry of said order of December 8, 1942, the Supreme Court of the United States handed down its decision in the case of *Williams and Hendrix*, petitioners, vs. *The State of North Carolina*, No. 29 October [fol. 16] Term 1942. Said decision was filed on December 21, 1942, and in and by the same the former decision of said Court as rendered in *Haddock vs. Haddock*, 201 U. S. 562 was overruled.

Third. Petitioner now avers that he was divorced from the prosecutrix by a decree entered on September 8, 1941 by the Eighth Judicial District Court of the State of Nevada in and for the County of Clark. In and by said decree it

was ordered that the bonds of matrimony theretofore existing between the petitioner and the prosecutrix should be and the same were wholly dissolved and each of said parties restored to the status of single persons. The said decree of divorce is by virtue of the aforesaid decision of the Supreme Court of the United States, filed December 21, 1942, entitled to full faith and credit in this Court.

Fourth. An exemplification of the record of said divorce proceeding in said Nevada Court, duly certified pursuant to the provisions of the Act of Congress relating thereto, is hereto attached, made part hereof and marked Exhibit A.

Fifth. Petitioner is no longer the husband of the prosecutrix and has not been such since September 8, 1941, when the duty to pay support to prosecutrix ceased.

Wherefore, petitioner prays that the aforesaid order of support as entered herein under date of December 8, 1942 be vacated and that this proceeding be dismissed.

William F. Esenwein.

[fol. 17] *Duly sworn to by William F. Esenwein. Jurat omitted in printing.*

[fol. 18] EXHIBIT "A" TO PETITION FOR REVOCATION OF ORDER OF SUPPORT

IN THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK

No. 12316

WILLIAM F. ESENWEIN, Plaintiff,

vs.

MAY H. ESENWEIN, Defendant

Endorsed. Filed—Aug. 5, 1941. Lloyd S. Payne, Clerk, by Jean Purdue Deputy

COMPLAINT

Plaintiff complains of the defendant and for cause of action alleges:

I

That the plaintiff is now, and for more than six weeks last past; immediately preceding the filing of this action,

has been a bona fide resident of the County of Clark, State of Nevada, and has continuously resided and been physically present and domiciled during all of said period in said County of Clark.

II

That the plaintiff and defendant intermarried at the City of Pittsburgh, State of Pennsylvania, on or about the 22nd day of November, 1899, and they ever since have been, and still are husband and wife.

[fol. 19] III

That there are no minor children, the issue of said marriage.

IV

That there is no community property of the parties hereto.

V

That the plaintiff and defendant have lived separate and apart for more than three (3) consecutive years last past and immediately preceding the commencement of this action, without cohabitation.

Wherefore, plaintiff prays judgment:

1. That he be granted an absolute decree of divorce dissolving the bonds of matrimony existing between plaintiff and defendant, and that the parties hereto be released from all the obligations thereof and restored to the status of single persons.

2. Plaintiff also prays for general relief.

Ham & Taylor, by A. W. Ham, Attorneys for Plaintiff.

STATE OF NEVADA,
County of Clark, ss:

William F. Esenwein, being first duly sworn according to law, deposes and says:

[fol. 20] That he is the plaintiff in the above entitled action;-that he has read the foregoing Complaint and knows the contents thereof and that the same is true of his own

knowledge except as to any matters therein stated upon information and belief, and as to those matters he believes it to be true.

William F. Esenwein.

Subscribed and sworn to before me this 5th day of August, 1941. A. W. Ham, Notary Public in and for the Said County of Clark, State of Nevada. (Seal.)

IN THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK

No. 12316

WILLIAM F. ESENWEIN, Plaintiff,

vs.

MAY H. ESENWEIN, Defendant

Endorsed. Filed Aug. 5, 1941. Lloyd S. Payne, Clerk, by Jean Purdue Deputy

AFFIDAVIT FOR ORDER OF PUBLICATION OF SUMMONS

STATE OF NEVADA,
County of Clark, ss:

William F. Esenwein, being first duly sworn upon oath, deposes and says:

[fol. 21] 1. That I am the plaintiff in the above entitled action. That the Complaint in said action was duly filed with the Clerk of this Court on the 5th day of August, 1941, and Summons therein thereupon duly issued.

2. That the said action is an action for divorce upon the ground of three years separation without cohabitation, all of which fully appears in plaintiff's verified Complaint on file herein, reference to which is hereby made and the same by reference made a part hereof.

3. That the said May H. Esenwein is a necessary and proper party defendant to said action for the reason that this is an action for divorce and she is the wife of plaintiff.

4. That I have fairly and fully stated the facts of the case to Ham & Taylor, my attorneys and counsel herein, and I am by them advised and I verily believe that I have a good cause of action in this suit against the said defendant, as will fully appear by my verified Complaint hereinbefore referred to.

5. That the said defendant, May H. Esenwein, is not a resident of the State of Nevada and cannot be found therein; that the said defendant's last known and present place of residence and address is Fort Pitt Hotel, Pittsburgh, Pennsylvania. That personal services of summons herein cannot be made or had upon the said defendant for the reason that she is within the State of Pennsylvania and not within the State of Nevada.

[fol. 22] Wherefore, I ask for an order that service of summons herein be made upon said defendant by publication and that personal service may be had upon said defendant without the State of Nevada in lieu of service by publication and mailing.

William F. Esenwein.

Subscribed and sworn to before me this 5th day of August, 1941. A. W. Ham, Notary Public in and for the Said County of Clark, State of Nevada. (Seal.)

In the Eighth Judicial District Court of the State of Nevada, in and for the County of Clark

No. 12316

William F. Esenwein, Plaintiff,

vs.

May H. Esenwein, Defendant

Endorsed. Filed Aug. 5, 1941. Lloyd S. Payne, Clerk, by Jean Purdue Deputy

Order for Publication of Summons

Upon reading and filing the affidavit of William F. Esenwein, plaintiff herein, and upon the records and files herein, and it satisfactorily appearing therefrom to me, the Judge

of the Eighth Judicial District Court of the State of Nevada, in and for Clark County, that May H. Esenwein, the [fol. 23] defendant herein, resides out of this state; and it appearing from the said affidavit that a cause of action exists in this action in favor of the plaintiff and against the defendant, May H. Esenwein, and that the said defendant is a necessary and proper party defendant thereto; and it further appearing therefrom that the last known and present place of residence and address of the said defendant is Fort Pitt Hotel, Pittsburg, Pennsylvania; and that personal service of summons herein cannot be made or had upon the said defendant for the reasons hereinbefore mentioned, and by the said affidavit made to appear, on motion of Ham & Taylor, attorneys for the plaintiff, it is,

Ordered that service of summons in this action be made upon the defendant by publication thereof in the Las Vegas Evening Review-Journal, a newspaper published daily, except Sundays, at Las Vegas, Clark County, Nevada, which said newspaper is hereby designated by the Court as the paper most likely to give notice to said defendant, and that such publication be made at least once a week for four consecutive weeks.

And it further appearing, in like manner, that the last known and present place of residence and address of said defendant is Fort Pitt Hotel, Pittsburgh, Pennsylvania, it is hereby

Ordered that a copy of the summons and a certified copy of the Complaint in this action be forthwith deposited in the Post Office at Las Vegas, Nevada, postpaid, directed to [fol. 24] the said defendant at her said address.

It is further ordered that personal service may be had upon said defendant without the State of Nevada in lieu of service by publication and mailing.

Dated this 5th day of August, 1941.

George E. Marshall, District Judge.

IN THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK

No. 12316

WILLIAM F. ESENWEIN, Plaintiff,

vs.

MAY H. ESENWEIN, Defendant

Endorsed. Filed—Sep. 8, 1941. Lloyd S. Payne, Clerk, by Eva Perry, Deputy

PROOF OF SERVICE

STATE OF PENNSYLVANIA,
County of Allegheny, ss:

I, Louis F. Silhol, being first duly sworn according to law depose and say:

That I am now, and at all times herein mentioned, was a citizen of the United States of America, over the age of twenty-one years; that at the City of Pittsburgh, State of [fol. 25] Pennsylvania, on the 7th day of August, 1941, I personally served the annexed summons upon the defendant therein named, May H. Esenwein, by delivering to and leaving with the said defendant, personally, a copy of the said summons and showing to and reading to said defendant the original summons hereto annexed; that at the same time and place I delivered to and left with the said defendant a certified copy of the Complaint on file in said action; that the person so served was personally known to me to be the defendant therein named; that I am not a party to the above entitled action and am not related to either of the parties thereto and am in no wise interested in the outcome thereof.

Dated this 7th day of August, 1941.

Louis F. Silhol

Subscribed and sworn to before me this 7th day of August, 1941. Sue B. Fritz, Notary Public in and for the Said County and State. My Commission expires February 21, 1943. (Seal.)

[fol. 26] IN THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK

No. 12316

WILLIAM F. ESENWEIN, Plaintiff,

vs.

MAY H. ESENWEIN, Defendant

Returned and Filed

Endorsed 19—. Filed Sep. 8, 1941. Lloyd S. Payne, Clerk, by Eva Perry, Deputy Clerk; —— ——, Deputy

SUMMONS

The State of Nevada Sends Greetings to Said Defendant —— ——:

You are hereby summoned to appear within ten days after the service upon you of this summons if served in said County, or within twenty days if served out of said County but within said Judicial District, and in all other cases within thirty days (exclusive of the day of service), and defend the above entitled action.

This action is brought to recover judgment dissolving the bonds of matrimony existing between you and the plaintiff upon the ground of three years separation without cohabitation, all of which fully appears in plaintiff's verified Complaint on file herein, reference to which is hereby made and the same by reference made a part hereof.

[fol. 27] Dated this 5th day of August, A. D. 1941.

Lloyd S. Payne, Clerk of the Eighth Judicial District Court of the State of Nevada, in and for Clark County, Nevada. Ham & Taylor, Las Vegas, Nevada, Attorney for Plaintiff By Jean Purde, Deputy. (Seal.)

IN THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK

No. 12316

WILLIAM F. ESENWEIN, Plaintiff,

vs.

MAY H. ESENWEIN, Defendant

Endorsed. Filed—Sep 8-1941. Lloyd S. Payne, Clerk. By Jean Rasmussen, Deputy.

DECREE OF DIVORCE

This action coming on regularly for trial before the Court on this 8th day of September, 1941, Ham & Taylor appearing as attorneys for the plaintiff, the defendant having been duly served with Summons and having failed to appear, plead or answer within the time provided by law [fol. 28] and default having been regularly entered against the said defendant, upon the Complaint of the plaintiff and all the records and files herein, and the plaintiff introducing evidence in support of the allegations of his Complaint, the defendant not introducing evidence, and the Court being fully advised in the premises,

The Court Finds:

1. That the Court has jurisdiction of the parties hereto and of this cause of action.

2. That the plaintiff is now, and for more than six weeks last past, immediately preceding the filing of this action, has been a bona fide resident of the County of Clark, State of Nevada, and has continuously resided and been physically present and domiciled during all of said period in said County of Clark.

3. That the plaintiff and defendant intermarried at the city of Pittsburgh, State of Pennsylvania, on or about the 22nd day of November, 1899, and they ever since have been, and still are husband and wife.

4. That there are no minor children, the issue of said marriage.

5. That there is no community property of the parties hereto.

6. That the plaintiff and defendant have lived separate and apart for more than three (3) consecutive years last past and immediately preceding the commencement of this [fol. 29] action, without cohabitation, and ever since have so continued to so live separate and apart.

7. That all the allegations of plaintiff's Complaint are true.

Now Therefore, by reason of the law in such cases made and provided and the Court deeming this a proper case therefor, on motion of Ham & Taylor, Attorneys for plaintiff,

It is Ordered, Adjudged and Decreed, that the bonds matrimony now and heretofore existing between the plaintiff, William F. Esenwein, and the defendant, May H. Esenwein, be, and the same are hereby wholly dissolved and a decree of absolute divorce is hereby granted plaintiff and each of the parties hereto are hereby restored to the status of single persons.

Dated and done in open Court this 8th day of September, 1941.

George E. Marshall, District Judge.

[fol. 30] In the Eighth Judicial District Court of the State of Nevada, in and for the County of Clark

No. 12316

William F. Esenwein, Plaintiff,

vs.

May H. Esenwein, Defendant

Filed ——, 19—. Endorsed. Filed—Sep. 8-1941. Lloyd S. Payne, Clerk. By Eva Perry Deputy Clerk.

Praecipe for Default

To the Clerk of the above entitled Court:

The defendant above named, May H. Esenwein, having been duly and regularly served with process herein, and

having failed to appear in said action and having failed to answer or otherwise plead herein, and more than 30 days having elapsed since said service, and being in default, you are hereby requested and directed to enter the default of said defendant.

Dated this 8th day of September, 1941.

Ham & Taylor, By: A. W. Ham, Attorneys for Plaintiff.

[fol. 31] IN THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK

No. 12316

WILLIAM F. ESENWEIN, Plaintiff,

vs.

MAY H. ESENWEIN, Defendant

Filed —— —, 19—. Endorsed. Filed—Sep. 8, 1941. Lloyd S. Payne, Clerk. By Eva Perry, Deputy Clerk.

DEFAULT

It appearing from the files and records in the above entitled action that May H. Esenwein defendant herein, was duly served with Summons on the 7th day of August, A. D. 1941, at the County of Allegheny, State of Pennsylvania, and that more than 30 days, exclusive of the day of service, have expired since said service upon the defendant, and no answer or demurrer having been filed or other defense made by defendant, and no further time having been granted, the default of May H. Esenwein defendant herein in failing to answer or make defense to plaintiff's complaint, is hereby entered.

Witness my hand and the Seal of said Court, this 8th day of September, A. D. 1941.

Lloyd S. Payne, Clerk. By Eva Perry, Deputy Clerk. (Seal.)

[fol. 32] IN THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK

No. 12316

WILLIAM F. ESENWEIN, Plaintiff,

vs.

MAY H. ESENWEIN, Defendant

Endorsed. Filed—Sep. 8, 1941. Lloyd S. Payne, Clerk. By Eva Perry, Deputy.

AFFIDAVIT

I, William F. Esenwein the plaintiff above named, do hereby certify that I know of my own knowledge that the defendant above named is not now, nor was he within sixty days prior to the making of this affidavit: (a) In the military service of the United States, or (b) in training or service with the land or naval forces of the United States, or (c) a member of any reserve component of such forces on active duty for a period of more than one month.

William F. Esenwein.

Subscribed and sworn to before me this 8th day of September, 1941.

A. W. Ham, Notary Public, Clark Co., Nevada.
(Seal.)

[fol. 33] IN THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK

No. 12316

WILLIAM F. ESENWEIN, Plaintiff,

vs.

MAY H. ESENWEIN, Defendant

Endorsed: Filed Sep. 9, 1941. Lloyd S. Payne, Clerk, by Jean Rasmussen, Deputy.

Before the Honorable George E. Marshall, District Judge

9:25 A. M., September 8, 1941.

A. W. Ham, Esq., Attorney for plaintiff.

Complaint filed August 5, 1941; Affidavit and Order for Publication of Summons; Proof of Service, Summons, Praecipe for Default, Default and Affidavit re Military Service on file.

WILLIAM F. ESENWEIN was called as a witness in his own behalf, and after being first duly sworn was examined by Mr. Ham and testified as follows:

Q. State your name, please, Mr. Esenwein.
A. William F. Esenwein.
Q. You are the plaintiff in this action?
A. Yes, sir.
Q. Are you acquainted with May H. Esenwein, the defendant?
A. Yes, sir.
Q. What relationship, if any, does she bear to you?
A. My wife.
[fol. 34] Q. Where do you live, Mr. Esenwein?
A. Las Vegas.
Q. When did you first become a resident of Las Vegas, Clark County, Nevada?
A. June 23, 1941.
Q. Were you present in the City of Las Vegas, Clark County, Nevada, every day from and including June 23, 1941, to and including August 5, 1941?
A. Yes, sir.
Q. And you have been here continuously since August 5th?
A. Yes, sir.
Q. When you came to Nevada you came with the intention of making Clark County, Nevada, your permanent place of residence?
A. Yes, sir.
Q. Have you retained that intention ever since?
A. Yes, sir.
Q. And you have it now?
A. Yes, sir.
Q. Where were you and the defendant married?
A. Pittsburgh.
Q. Pennsylvania?
A. Pennsylvania.
Q. When?
A. November 22, 1899.
Q. And you have been husband and wife ever since?
A. Yes, sir.
Q. Are there any children the issue of the marriage?
A. Yes, sir.
Q. No minor children?

A. No minor children.

Q. Is there any community property belonging to you and the defendant?

A. No, sir.

Q. You allege in your complaint that you and the defendant have lived separate and apart for more than 3 consecutive years last past and immediately preceding the [fol. 35] commencement of this action without cohabitation, is that correct?

A. Yes, sir.

Q. And that condition has continued since the filing of the action?

A. Yes, sir.

Q. When did you and the defendant separate?

A. On October 31, 1919.

Q. And have you lived separate and apart without cohabitation continuously since October 31, 1919?

A. Yes, sir.

Q. And when you were living together, you and your wife didn't get along?

A. No, sir.

Q. You do not believe it possible that you and she would ever live together again?

A. It is not possible.

By the Court: No questions.

Albert Jenkins was called as a witness on behalf of the plaintiff, and after being first duly sworn was examined by Mr. Ham and testified as follows:

Q. State your name, please?

A. Albert Jenkins.

Q. You reside in Las Vegas, Clark County, Nevada, Mr. Jenkins?

A. Yes.

Q. And have for a number of years last past?

A. Yes, sir.

Q. Are you acquainted with William F. Esenwein, the plaintiff in this action?

A. Yes, I am.

Q. When did you first meet Mr. Esenwein?

A. On June 23, 1941.

[fol. 36] Q. Have you seen him in Las Vegas, Clark County, Nevada, every day from and including June 23, 1941 to the present time?

A. Yes, I have.

By the Court: A decree may be granted.

I Hereby Certify that the foregoing is a full, true and correct transcript of my shorthand notes taken in said action.

Martha Lundy, Reporter Pro Tem.

STATE OF NEVADA,
County of Clark, ss:

I, Lloyd S. Payne, the duly elected, qualified and acting County Clerk of the County of Clark, State of Nevada, and *ex-officio* Clerk of the District Court of the Eighth Judicial District of the State of Nevada, in and for the County of Clark, do hereby certify and attest the foregoing to be a full, true and correct copy of the original, Number 12316

WILLIAM F. ESENWEIN, Plaintiff,

vs.

MAY H. ESENWEIN, Defendant.

Complaint, Affidavit for Order for Publication of Summons, Order for Publication of Summons, Proof of Service, Summons, Decree of Divorce, Praecipe for Default, Default, Affidavit of Non-Military Service, Reporter's Transcript.

together with the endorsements thereon, now on file in my office, and that I have carefully compared the same with the original.

[fol. 37] In Witness Whereof, I have hereunto set my hand and annexed the Seal of the District Court of the Eighth Judicial District of the State of Nevada, in and for the County of Clark, this 25th day of January, 1943.

Lloyd S. Payne, County Clerk of the County of Clark, State of Nevada, and *ex-officio* Clerk of the District Court of the Eighth Judicial District of the State of Nevada, in and for the County of Clark. (Seal.)

STATE OF NEVADA,
County of Clark, ss.:

I, GEORGE F. MARSHALL, Judge of the District Court of the Eighth Judicial District of the State of Nevada, in and for the County of Clark, do hereby certify that Lloyd S. Payne is County Clerk of the County of Clark, State of Nevada, and *ex-officio* Clerk of the District Court of the Eighth Judicial District of the State of Nevada, in and for the County of Clark (which Court is a Court of Record having a seal); that the signature to the foregoing certificate and attestation is the genuine signature of the said Lloyd S. Payne, as such officer; that the seal annexed thereto is the seal of said District Court; that said Lloyd S. Payne, as such clerk, is the proper officer to execute the said certificate of attestation, and that such attestation is in due form according to the laws of the State of Nevada.

[fol. 38] In Witness Whereof, I have hereunto set my hand in my official character as such Judge, at the City of Las Vegas, County and State aforesaid, this 25th day of January, A. D. 1943.

George E. Marshall, Judge of the District Court of the Eighth Judicial District of the State of Nevada, in and for the County of Clark.

STATE OF NEVADA,
County of Clark, ss.:

I, LLOYD S. PAYNE, County Clerk of the County of Clark, State of Nevada, and *ex-officio* Clerk of the District Court of the Eighth Judicial District of the State of Nevada, in and for the County of Clark (which Court is a Court of Record, having a seal, which is annexed hereto) do hereby certify that George E. Marshall, whose name is subscribed to the foregoing certificate of due attestation was, at the time of signing the same, Judge of the District Court aforesaid, and was duly commissioned, qualified and authorized by law to execute said certificate. And I do further certify that the signature of the Judge above named to the said certificate of due attestation is genuine.

In Witness Whereof, I have hereunto set my hand and annexed the Seal of the District Court of the Eighth Ju-

dicial District of the State of Nevada, in and for the County [fol. 39] of Clark, this 25th day of January, 1943.

Lloyd S. Payne, County Clerk of the County of Clark, State of Nevada, and *ex-officio* Clerk of the District Court of the Eighth Judicial District of the State of Nevada, in and for the County of Clark. (Seal.)

In County Court of Allegheny County

Order Granting Rule

And now, Feb. 1st, 1943, the foregoing petition having been presented in open court, upon consideration thereof, on motion of counsel for petitioner, it is ordered that said petition be filed and that a rule be and it is hereby granted upon the said May H. Esenwein, prosecutrix, to show cause why the prayer of said petition should not be granted, returnable the 11th day of Feb., 1943, service of notice of the filing of said petition and of the entry of this rule to be made upon the said prosecutrix by delivering to her a copy of said petition and this order, but omitting a copy of Exhibit A attached thereto, either personally or by registered mail directed to her last known address.

Lencher, J.

[fol. 40] In County Court of Allegheny County

Answer—Filed February 8, 1943

State of Ohio,
County of Cuyahoga, ss.:

Before me, the undersigned competent authority, personally appeared Wm. F. Esenwein, who being duly sworn according to law, deposes and says, by way of answer to the rule to show cause issued in this case and returnable February 10, 1943, as follows:

1. Affiant has already filed in this case a petition for the vacation of the current order of support and has obtained a rule to show cause which is returnable February 11, 1943.

2. As set forth in affiant's said petition, affiant is no longer the husband of the prosecutrix. He is legally divorced from her.

Affiant therefore prays that both said rules be heard by the Court at the same time and that his said rule be made absolute and that the rule obtained by the prosecutrix be discharged.

Wm. F. Esenwein.

Sworn to and subscribed before me this 6th day of February 1943.

William E. Stroup, Notary Public. (Seal.)

My Commission expires Feb. 22, 1945.

[fol. 41] In County Court of Allegheny County

Answer to Petition—Filed February 17, 1943

And Now, to wit, this 17th day of February, 1943 comes the above May H. Esenwein, respondent named in the Petition of William F. Esenwein, and makes Answer as follows:

First: The historical facts and docket entries referred to by Petitioner in the First Paragraph of his Petition are admitted.

Second: The averments contained in the Second Paragraph of said Petition as far as they relate to the mere fact of a decision having been handed down by the U. S. Supreme Court in Williams, *et al.* vs. State of North Carolina, are admitted.

As to whether or not said decision overruled the case of Haddock vs. Haddock (201 U. S. 562), if material to the present issue, is not a matter of pleading, but is a question of judicial interpretation; and is therefore not admitted.

Third: Respondent, May H. Esenwein, denies that petitioner was divorced from her by a decree entered on September 8th, 1941 by the Eighth Judicial District Courts of the State of Nevada in and for the County of Clark; on the contrary if such a pretended decree exists it is and was at all times, a nullity, and absolutely of no legal force, effect or validity, for the reason that the matters which

said proceedings and Decree in Nevada attempted to open up, deal with, and adjudicate, had, prior thereto, been already decided, and fully and completely adjudicated by the [fol. 42] Courts of the State of Pennsylvania and were therefore *Res Adjudicata;* and said adjudication of the Pennsylvania Courts were and became binding under the full, faith and credit clause of the United States Constitution, upon the State of Nevada and upon all other States.

The said pretended Nevada "Decree", and the contents, substance and provisions thereof and therein are likewise a nullity, and of no legal force, effect or validity.

It is denied that by reason of the said case of Williams, *et al.* vs. State of North Carolina, or for any other reason whatsoever that the said alleged Decree of Divorce in Nevada is "entitled to full faith and credit in this court"; but on the contrary, said Nevada "decision", being a complete legal nullity, cannot and will not be recognized in Pennsylvania.

Fourth: Admitted.

Fifth: It is denied that "Petitioner is no longer the husband of the prosecutrix and has not been such since September 8th, 1941, when the duty to pay support to prosecutrix ceased", but on the contrary it is stated that the petitioner, William F. Esenwein, now is, and at all times since November 22nd, 1899, the date of marriage, was and continues to be, the husband of the prosecutrix, to-wit, the respondent herein, May H. Esenwein; and that the duty to pay her support has not ceased at any time, but continues in full force and *affect*.

[fol. 43] Sixth: For further answer respondent avers and says that the said proceedings in Nevada resulting in a so-called decision or decree in divorce in favor of petitioner, were conceived and executed in fraud both upon the States and Courts of Nevada and Pennsylvania.

Wherefore, respondent May H. Esenwein prays that the Petition of her husband, William F. Esenwein, for revocation of the Order of Court for her support, be dismissed at the Costs of said Petitioner.

May H. Esenwein.

Duly sworn to by May H. Esenwein. Jurat omitted in printing.

[fol. 44] In County Court of Allegheny County

Petition for Amendment of Petition for Revocation of Order of Support and for Other Relief

Filed February 26, 1943

To the Honorable, the Judges of said Court:

The petition of William F. Esenwein respectfully represents:

First: That he desires to amend and supplement his petition previously filed in this proceeding, in which he prayed for the entry of an order vacating the previous order of support and for the dismissal of this proceeding, in the following respects, to wit:

a. In and by the petition which he presented to this Court on July 22, 1942, petitioner set forth that he was a resident of Cleveland, Ohio, and that he had been divorced from the prosecutrix on September 8, 1941, but he did not present to this Court for adjudication his right to plead said divorce as a defense to the claim of the prosecutrix for support. His failure to do so was occasioned by the fact that he was then obliged to abide by the then prevailing rule of law in this state to the effect that his Nevada divorce did not entitle him to such a release.

b. Petitioner is advised and believes and therefore avers that the promulgation of a new rule of law as to the effect of foreign divorce decrees, brought about by the decision of the Supreme Court of the United States in the decision [fol. 45] rendered December 21, 1942 in the case of Williams and Hendrix vs. the State of North Carolina constituted such a change in the conditions and circumstances of the parties to this present litigation, occurring since the entry by this Court of the order of December 8, 1942, as to entitle petitioner to a revocation of said order.

Petitioner therefore prays that his petition of February 1, 1943 be amended in the foregoing particulars.

Petitioner prays further that your Honorable Court open the aforesaid order of December 8, 1942, in order that petitioner may now include in his said petition, presented July

22, 1942, an allegation to the effect that he was then legally divorced from the prosecutrix and no longer her husband.

Petitioner prays further that in view of the shortness of time, the Court accept this petition without his signature and verification.

Feb. 26, 1943.

William F. Esenwein, By F. C. Houston, Sidney J. Watts, *His Attorneys.*

ORDER

And now, to-wit, this 26th day of February, 1943, the foregoing petition being presented in open court, upon [fol. 46] consideration thereof and on motion of counsel for petitioners, it is ordered that the said petition be filed and that the amendment prayed for, of the petition filed herein on February 1, 1943, be and the same is hereby allowed; and petitioner's prayer for opening of the order of December 8, 1942 is hereby refused.

Gunther, *J.*

IN THE COUNTY COURT OF ALLEGHENY COUNTY

No. C 287 of 1922

COMMONWEALTH, ex rel., MAY H. ESENWEIN,

vs.

WILLIAM F. ESENWEIN

Transcript of Official Notes of Proceedings

Hearing held before Hon. Blair F. Gunther, *J.* Pittsburgh, Pennsylvania, Thursday, February 18th, 1943, at 1:30 p. m. E. W. T.

On Petition for Revocation of Order of Support.

APPEARANCES:

For petitioner: S. J. Watts, Esq., F. C. Houston, Esq., Louis F. Silhol, Esq.

For Respondent: N. J. Lippard, Esq., Jacob Seligsolin, Esq.

Reported by C. E. Urban, Official Reporter, 530 Court House, Pittsburgh, Penna.

[fol. 47] PETITIONER'S CASE.

Mr. Watts: If Your Honor please, I wish to state into the record that, this morning, we served upon Attorney N. J. Lippard a notice that we would at this hearing ask the Court to take judicial notice of the common law and statutes of the State of Nevada with respect to the subject of divorce and, particularly, the provisions of the statutes of said State with respect to the requirements of residence by the Libellant, Substitute Service of Process upon non-resident Respondents, causes for granting of divorces, etc.

Now, Mr. Lippard, I ask you if you will admit that service was made?

Mr. Lippard: I will admit the service was made, but we ask the Court not to take judicial notice of the laws of the State of Nevada inasmuch as the State of Nevada has not taken judicial notice of the laws of the State of Pennsylvania.

The Court: There is no question but that the documents are all right. They are verified and certified.

Mr. Seligsohn: The notice in question, addressed to N. J. Lippard, Esq., Attorney for the Prosecutrix, was, to my knowledge, left at the office of Mr. Lippard, 421 Frick Building, today, February 18, 1943, at a time when he was absent from his office, and upon my arrival at his office the notice [fol. 48] was exhibited to me by his secretary. I wish to state on the record that we object to any introduction of any attempt to have this court take judicial notice of the common law and statutes of the State of Nevada with respect to the subject of divorce and, particularly, the requirements of the statutes of said State with respect to the requirements of residence by the Libellant, Substitute Service of Process upon non-resident respondents, causes for the granting of divorces, etc., for the reason that this is an attempt to lay a basis for the introduction of this case of a decree made September 8, 1941 by the courts of Nevada, which decree we are going to maintain, as this hearing proceeds, was fraudulent.

Mr. Watts: I must interpose an objection to the remarks of counsel as being absolutely irrelevant. I take it to be in order for counsel to object to something when and as it is offered, but not to go on making a speech about something that has not been offered.

The Court: The Court will sustain the objection as far as judicial notice is concerned and ask counsel to produce his documents and proceed.

(Objection sustained and exception noted.)

Mr. Watts: In order that this Court may have a clear understanding of what is before it, I wish to read into this record the substance or averments of the original Petition. [fol. 49] *Mr. Seligsohn:* In what jurisdiction? Where?

Mr. Watts: In this case. In this court.

To wit, the paper I have before me which is headed by the word "Information." "County of Allegheny, S. S., before me, the Clerk of the County Court in and for the County of Allegheny, personally came May H. Esenwein, wife of Defendant, who, upon oath duly administered according to law, deposes and says that, at Bellevue, Pennsylvania, in the County of Allegheny, on the blank day of March, A. D., 1920, Defendant aforesaid, William F. Esenwein.

1. Has without reasonable cause—"

Mr. Seligsohn: I object to the offer of this "Information" at this time because this hearing does not pertain to the Information that was made in the beginning of this case; this hearing was based entirely on the Petition for Revocation of Order of Support, which order was dated December 8, 1942, and that is the matter we are concerned with primarily. If counsel wants to consider that matter and that Petition, all right, as that is the matter we are called upon to decide today.

The Court: Objection overruled. Exception.

(Objection overruled and exception noted.)

Mr. Watts (Continuing:) "1. Has without reasonable cause separated himself from his wife May H. Esenwein [fol. 50] and children May H. age nineteen years and William H. age sixteen years.

2. Has neglected to maintain his wife May H. Esenwein and children as above, contrary to the provision of the Act of Assembly in such case made and provided.

Complainant therefore prays and desires that a warrant may issue, and that defendant may be arrested and held to answer this charge of Desertion and Non-Support and further deponent saith not."

The Information was sworn to and filed under date of March 13, 1922.

Now, if Your Honor please, I wish to offer in evidence the averments of the first two paragraphs of our Petition which are admitted by the Answer which was served on us yesterday, namely:

"First. This proceeding was commenced by the above named prosecutrix to compel petitioner as her husband to contribute to her support. As the clerk's docket entries show, the Order as originally entered has been frequently modified. The most recent Order was entered under date of December 8, 1942, whereby arrearages in payment were reduced to One Thousand Dollars and the monthly rate reduced to Seventy-Five Dollars. Petitioner has paid the said sum of One Thousand Dollars."

Also averments of the second paragraph:

"Second. Shortly after the entry of said Order of December 8, 1942, the Supreme Court of the United States handed down its decision in the case of Williams and Hendrix, Petitioners, vs. The State of North Carolina, No. [fol. 51] 29 October Term, 1942. Said decision was filed on December 21, 1942, and in and by the same the former decision of said Court as rendered in Haddock vs. Haddock, 201 U. S. 562 was overruled."

Mr. Seligsohn: That is not admitted. At this point, we wish to state for the record that the Answer to the Petition filed in this case does not, on its face, admit that part of the second paragraph of the Petition for Revocation of Order of Support relating to Haddock versus Haddock, but on the contrary the Answer to the Petition, second part of the second paragraph, reads as follows:

"As to whether or not said decision overruled the case of Haddock vs. Haddock, 201 U. S. 562, if material to the present issue, is not a matter of pleading, but is a question of judicial interpretation; and is therefore not admitted."

Therefore, we move to strike from the record the part read by Mr. Watts as follows: "Said decision was filed on December 21, 1942, and in and by the same the former decision of said Court as rendered in Haddock vs. Haddock, 201 U. S. 562 was overruled." That part, we ask be stricken

from the record. I do not admit it, but on the contrary, I deny it, and he reads it in as pleading admitted.

Mr. Watts: Before the Court rules on the motion, I wish to call the attention of the Court to the language of Mr. Justice Douglas as it appears on page 216 of Volume 63, Su- [fol. 52] preme Court Reporter, in the Williams case, in which Mr. Justice Douglas said, "Haddock vs. Haddock is overruled", Mr. Justice Douglas having written the majority opinion of the Court.

Mr. Seligsohn: I still object to Mr. Watts pretending I admitted something which I did not admit.

The Court: You have the right to object and I believe the Court has the right to read both the paragraphs contained in the Petition and Answer and decide for itself. It is a question of fact for the Court and a question of law. (Exception noted.)

Mr. Watts: Further, in support of our Petition, we now offer in evidence the Exemplification of the Record of the case of William F. Esenwein vs. May H. Esenwein as filed in the Eighth Judicial District Court of the State of Nevada in and for the County of Clark, No. 12316, with particular reference to the Decree of Divorce which appears as a part of said Exemplification, entered under date of September 8, 1941, in which the Court, finds, among other things, "that the plaintiff is now, and for more than six weeks last past, immediately preceding the filing of this action, has been a *bona fide* resident of the County of Clark, State of Nevada, and has continuously resided and been physically present and domiciled during all of said period in said County of Clark." And, with reference also to the concluding paragraph of said Decree in which "it is ordered, adjudged, and [fol. 53] decreed, that the bonds of matrimony now and heretofore existing between the plaintiff, William F. Esenwein, and the defendant, May H. Esenwein, be, and the same are, hereby wholly dissolved and a decree of absolute divorce is hereby granted plaintiff and each of the parties hereto are hereby restored to the status of single persons"; Said Exemplification being certified by the Clerk of said court, evidenced by the seal of said court thereto attached and the signature of said Clerk being certified to by George E. Marshall, Judge of said court, and the signature of said Judge being in turn certified to be the Clerk of said court with the seal of said court attached, said

certification being in accordance with the provisions of the Act of Congress which appears in 28 U. S. C. A., Section 687.

Mr. Seligsohn: At this time, counsel for May H. Esenwein, the Prosecutrix, Respondent in this case, objects to the introduction into the record of the Exemplification of the Record just read and just offered for the reason that there is more to this case than would appear merely upon the face of such Exemplification. We object to all the contents embraced within that Exemplification, particularly the alleged Decree of Divorce and the statement of the Court in Nevada that Libellant William F. Esenwein had obtained a proper legal residence or domicile in good faith in the State of Nevada, for the reason that the jurisdiction of the court in Nevada depended, not merely upon six weeks residence prior to the bringing of the Libel, but also depended upon a [fol. 54] *bona fide* intention on the part of William F. Esenwein to remain in Clark County, Nevada, making that County his domicile indefinitely, whereas it is true and a fact that said William F. Esenwein, having obtained the Decree of Divorce in Nevada, allegedly, on September 8, 1941, did go to Cleveland, Ohio, the very next month.

The Court: You are going into the legal effect of this document. The only thing we have now is the presentation of this Exemplification as evidence. Do you say that is the true Exemplification or do you deny that is the Exemplification?

Mr. Seligsohn: We deny the entire jurisdiction of the document and we object to it.

The Court: The objection is overruled and exception is noted.

(Objection overruled and exception noted.)

(Argument off record.)

Mr. Watts: If your Honor please, we request the Court to take judicial notice of an Act of the Legislature of the State of Nevada as appears in the Statutes of Nevada for the year 1931 at page 159 in which it is said, with respect to the matter of service, "When publication" [illegible] personal service [illegible] copy of the Summons [illegible] of the State shall be equivalent to personal service [illegible] deposit in the post office [illegible]

[fol. 55] served shall have thirty days after said service to appear and answer or demur."

I call your Honor's attention to the fact that that method of service was followed in the Nevada case as shown by the Exemplification.

Mr. Seligsohn: We object to the introduction of the matter just offered by Mr. Watts and we also object to the entire proceeding in Nevada as having been without jurisdiction and an attempt to deal with a matter already *Res Judicata*. Our position in this case is that since Nevada had no jurisdiction and since the entire proceedings in Nevada were in fraud, since the matter had been *Res Judicata*, we do not care anything whatsoever about the laws of Nevada because the Decree which purports to be a Decree in Divorce is really an absolute nullity for want of jurisdiction and by reason of fraud for the reason that it had been *Res Judicata*, prior, in Pennsylvania.

The Court: The objection is overruled, and an exception noted.

(Objection overruled, exception noted.)

Mr. Watts: I also ask the Court to take judicial notice of an Act of the Legislature of the State of Nevada as it appears in the Statutes of Nevada for the year 1939 at page 16, reading, in part, as follows:

"Section 1. Divorce from the bonds of matrimony may be obtained in addition to the causes now provided by law and [fol. 56] subject to the same procedure and requirements for the following cause:

When the husband and wife have lived separate and apart for three consecutive years without cohabitation the Court may, in its discretion, grant an absolute Decree of Divorce at the suit of either party."

We call the attention of the Court to the fact and circumstance, that, as appears by this Exemplification, the ground or cause of divorce upon which the Court based its decree, is this very cause or charge permitted by this Act of 1939.

Mr. Seligsohn: We object to the introduction of those grounds for divorce in Nevada for the same reasons as I stated in my last objection; on the ground of fraud and——

The Court: Are you objecting to the Court taking judicial notice as requested by Mr. Watts, or are you objecting to the introduction of the documents as immaterial to the case?

Mr. Seligsohn: I am objecting that they are immaterial to the case for the reason that the Nevada Court had no jurisdiction. It was *Res Judicata* in Pennsylvania; there was no domicile according to Nevada Law in Nevada; there [fol. 57] was no intention to remain permanently in Nevada; and the matter was *Res Judicata* in Pennsylvania prior to September 8, 1941.

(Argument off record.)

The Court: There is an objection on the record to the Court taking judicial notice of the grounds for divorce in Nevada, is that correct?

Mr. Seligsohn: Yes, sir. That is correct.

The Court: The Court will not take judicial notice of the grounds for divorce in Nevada insofar as they interfere in the same matter adjudicated in the State of Pennsylvania, but the Court will admit your statement of the facts as to what constitutes grounds for a divorce in Nevada unless there is no truth to it. You do not deny——

Mr. Seligsohn: We say it is entirely incompetent, irrelevant and immaterial because, as we will show, there was no jurisdiction in the court of Nevada for the reasons I have already stated on the record in connection with my objection.

The Court: Objection overruled. Exception noted.

(Objection overruled and exception noted.)

[fol. 58] *Mr. Watts:* I wish to ask if counsel for the prosecutrix considers that the divorce granted by the Nevada court was legal and valid in the State of Nevada?

Mr. Seligsohn: That pretended divorce which is in the Exhibit [illegible] you have exhibited to the stenographer today, Mr. Watts, and which [illegible] is absolutely invalid in Nevada for the reason that the court in Nevada did not, at any time, have jurisdiction of the

parties or of the subject matter because the law of Nevada requires two things: First, the necessary six weeks residence in the County where the complaint is brought, before the complaint is brought, and in addition thereto a bona fide intention to remain in that County, in this case Clark County, Nevada, and where it has been proved by events that the petitioner in that case, in violation of his pretended sworn statement that he intended to remain there in Nevada, came immediately after September 8, 1941, to Cleveland, Ohio.

(Argument off record.)

Mr. Watts: In view of the unresponsive nature of the answer by counsel to my inquiry with respect to the validity of this decree in Nevada as a final decree of a court of that State, I ask your Honor to take judicial notice also of the decision of the Supreme Court of the State of Nevada in the case of Lamb vs. Lamb, 57 Nevada, page 421, 1937,——

[fol. 59] *Mr. Seligsohn:* I object to the statement of counsel that my answer was not responsive. If anything, it was too responsive. I answered that I did not believe that Nevada had jurisdiction and, therefore, the Nevada divorce was a nullity.

The Court: Did you get your answer, Mr. Watts?

Mr. Watts: Let me finish this offer:

(Continuing) ——which, if consulted, your Honor, will appear to be a case in Nevada of a six weeks residence there by parties from Connecticut which was challenged by the respondent in the proceedings but the decision of the Trial Court granting the divorce was affirmed. This is one of the cases which was referred to by Mr. Justice Douglas in his opinion in the Williams case as setting forth the construction put by the Supreme Court of Nevada upon their divorce statutes with respect to residence.

The Court: This Court will take judicial notice of the fact that in the State of Nevada there is a law requiring six weeks' residence for divorce.

Mr. Seligsohn: Will your Honor take judicial notice also of the fact that it requires a bona fide intention to remain there? Will your Honor please put that on the record also.

[fol. 60] *The Court:* It is assumed that the residence is bona fide.

Mr. Watts: It has been so found by the Decree of the Court. That is our case, if your Honor please.

(Petitioner rests.)

(Argument off record.)

The Court: I cannot take judicial notice of the laws of Nevada as far as this particular case is concerned. An exception is noted to Mr. Watts. (Exception noted.)

Mr. Seligsohn: At this time, counsel for respondent, May H. Esenwein, moves to strike from the record and to dismiss all the testimony, documents, exemplifications, laws, and cases offered by the petitioner, William F. Esenwein, in this case which relate to the State and courts of Nevada.

The Court: The motion is refused and an exception is noted.

(Motion refused and exception noted.)

(Whereupon, at the hour of 4:30 P. M., Court adjourned to continue on Friday, February 26, 1943 at 2:00 o'clock P. M.)

(Friday, February 26, 1943, at 2:00 o'clock P. M.) (Hearing resumed.)

Mr. Watts: If the Court please, at the hearing last week we had put in substantially all the evidence that we had [fol. 61] in support of our Petition. In the meantime, further research inspired us to amplify our Petition and I now desire to present a Petition entitled, "Petition For Amendment Of Petition For Revocation Of Order Of Support And For Other Relief". This is an amendment of our Petition of February 4, 1943. The opinion of the Supreme Court came down December 21, and it took a few weeks for a person's ideas to become clarified or to the point at least where a Petition could be prepared.

Mr. Seligsohn: I might say that this should be presented to Mr. Lippard who is familiar with this case and knows all about the arrangements with which I have nothing to do, but I will say that I certainly will object to it because it does not take up the paragraphs of the last which reads: "Petitioner prays that the Court grant an Honorable Court open

the aforesaid order of December 8, 1942, in order that petitioner may now include in his said petition, presented July 22, 1942, an allegation to the effect that he was then legally divorced from the prosecutrix and no longer her husband." It is almost akin to asking the Court to sign an Order which would not be an Order but an Adjudication.

The Court: We do not want to open the Order of Non Support. We are only going to open the Order to let you in on the Amendment. What is the Order of December 8th?"

Mr. Watts: It is the Order made by Judge McKim on our petition of July, 1942, setting forth that there were arrear-[fol. 62] ages but that Mr. Esenwein's income had become so reduced that he sought a reduction in the amount of the current monthly Order and Judge McKim heard that petition,—petition and answer, and deposition taken in Cleveland,—and made that order reducing the arrearages to One Thousand Dollars and the monthly amount to Seventy-five Dollars.

(Discussion off record)

The Court: I am refusing to open the Order of December 8, 1942, but it is within the discretion of this court to allow this amendment. (Exception noted.)

Mr. Watts: If the Court please, with respect to these matters covered by sub-paragraphs "a." and "b." of this petition, I wish to refer the Court to the Petition of July 22, 1942, to the testimony which was taken by disposition in Cleveland in support of that petition and to the decree of this court as entered by President Judge McKim, for the purpose of substantiating the averments of these two sub-paragraphs of this petition. With that addition, our case is completed.

PROSECUTRIX-RESPONDENT'S CASE

Mr. Sellinsgrove: I wish to state for the record that we object to the introduction into this record or the interpretation of any amendment offered into this record that might have for its objective an adjudication or such adjudication that [fol. 63] the parties in this case are recognized other than as husband and wife in Pennsylvania.

The Court: Objection overruled. Exception.

(Objection overruled and exception noted.)

Mr. Seligsohn: If the Court please, Mr. Lippard has asked me to make this motion at the beginning of the proceedings:

We move that the petition in this case, for revocation of the order of this court, be forthwith dismissed unless the petitioner shall first comply with an order of this court already made and respect and obey that order for the support of May H. Esenwein, which order has not been respected and obeyed to the present date.

The Court: Motion is refused. Exception.

(Motion refused and exception noted.)

The Court: The petitioner has the right to file his appeal as a matter of course.

Mr. Seligsohn: The order has not been paid. What does Your Honor think ought to be done about this order?

The Court: I think it should be paid, but I cannot deny him his right to appeal.

[fol. 64] *Mr. Watts:* Mr. Esenwein is a non-resident and, therefore, not amenable to process of capias or bench warrant. I am instructed to say that when and as his case is adjudicated all arrearages will be promptly paid.

Mr. Seligsohn: That is what we object to. He has no right to assume to stay the order of this court until he sees fit or until he sees what the result of the present proceedings will be. We think that is in contempt of the court.

The Court: We are refusing the motion at this time. Now, is there anything in evidence as to a stipulation. Can you both agree that this case was before the courts of Pennsylvania and these are the same parties?

Mr. Watts: I cannot agree to anything like that.

Mr. Seligsohn: Will you agree that the William F. Esenwein and May H. Esenwein in the Superior Court decision, 141 Super. 604, are the same parties as those in this action?

Mr. Watts: I have no objection to agreeing to the fact of the identity of the parties, but I object very strenuously to the relevancy or materiality of the fact that there was such litigation at that time.

The Court: You agree as to the identity of the parties?

[fol. 65] *Mr. Watts:* Yes, sir.

Mr. Seligsohn: All right.

I now wish to state, for the record, what we intend to prove to clarify our position.

Mr. Watts: I object to proof of a case in such manner.

The Court: Objection sustained. Counsel will proceed with his evidence and if there are any objections Mr. Watts may object.

(Objection sustained, and an exception noted.)

Mr. Seligsohn: Depositions were taken in this case in which William F. Esenwein testified, in Cleveland, Ohio.

Mr. Watts: I have a copy of the deposition. I have already asked the court to take cognizance of it. If there is any portion of this deposition that you wish to offer verbatim, please indicate what it is by page and line.

Mr. Seligsohn: I refer to page 2 of the deposition of William F. Esenwein taken on Wednesday, November 19, 1942, before Roy C. Green.

Mr. Watts: What do you want to show now by line? What is there in that deposition that the Court cannot read as well as we can?

[fol. 66] *Mr. Seligsohn:* I have offered it as part of the record in this case. It was taken at 1857 Union Commerce Building, Cleveland, Ohio. I refer to page 2 of that deposition, Direct Examination of Mr. Esenwein by Mr. Houston:

> "Q. Mr. Esenwein, your name is William F. Esenwein and you are the petitioner in this case?
>
> A. Yes, sir.
>
> Q. Where do you live, Mr. Esenwein?
>
> A. 2635 North Moreland Boulevard, Cleveland, Ohio."

Also at page 6, Cross Examination of William F. Esenwein by Mr. Thomas:

> "Q. Mr. Esenwein, how long have you lived at 2635 North Moreland?
>
> A. Since some time in October, 1941.
>
> Q. And prior to that time you were a resident of Las Vegas, Nevada?
>
> A. Yes, sir."

We offer these particular lines and call them, particularly, to the Court's attention in this case. May we state

now, with the permission of the Court, that I will read from the Exemplification from Nevada in this case:

"In the Eighth Judicial District Court of the State of Nevada, in and for the County of Clark, No. 12316."

From the testimony in that case, as shown by the Exemplification:

"Q. State your name, please, Mr. Esenwein.

A. William F. Esenwein.

[fol. 67] Q. You are the plaintiff in this action?

A. Yes, sir.

Q. Are you acquainted with May H. Esenwein, the defendant?

A. Yes, sir.

Q. What relationship, if any, does she bear to you?

A. My wife.

Q. Where do you live, Mr. Esenwein?

A. Las Vegas.

Q. When did you first become a resident of Las Vegas, Clark County, Nevada?

A. June 23, 1941.

Q. Were you present in the City of Las Vegas, Clark County, Nevada, every day from and including June 23, 1941, to and including August 5, 1941?

A. Yes, sir.

Q. And you have been here continuously since August 5th?

A. Yes, sir.

Q. When you came to Nevada you came with the intention of making Clark County, Nevada, your permanent place of residence?

A. Yes, sir.

Q. Have you retained that intention ever since?

A. Yes, sir.

Q. And you have it now?

A. Yes, sir."

That is for the purpose of a comparison of the testimony in the records.

[fol. 68] I now refer to Corpus Juris, Volume 19, page 30, part of Sections 42 and 43, which I offer in evidence.

Mr. Watts: If the Court please, I object to this method of proof because, under the Uniform Taking of Notice of

Foreign Statutes Act of the State, the Court is permitted to take judicial notice of the common law and statutes of Nevada or of any other State; furthermore, under that Act to which I refer, it is unnecessary for counsel to read into the record those books to which the Court may make reference under its power to take judicial notice thereof.

The Court: The objection is sustained.

(Objection sustained and an exception noted.)

Mr. Seligsohn: Do I understand I am only to refer to the books without reading them?

The Court: You can refer to them, offer them in evidence and call the Court's attention to the pages in them to which you refer.

Mr. Seligsohn: All right. I refer to Corpus Juris, Volume 19, page 30, Item 7, entitled: "Facts Constituting", under the subject of "Divorce", being the first part, about one half of Sections 42 and 43, also introducing the Nevada law.

[fol. 69] *Mr. Watts:* That is objected to as incompetent as proof of anything relevant to this case for the reason that is not the proper way to prove either the common law or statute law of Nevada.

The Court: The objection is sustained. (Objection sustained and an exception noted.)

Mr. Seligsohn: I will now call the Court's attention to the case of Presson versus Presson, 38 Nevada Supreme Court, page 203, in regard to residence; also at page 206 and page 207 regarding residence and especially the decision that residence is made up of fact and intention; that is, of an abode with intention to remain. We offer this case in evidence and call Your Honor's attention to it, and we ask Your Honor to take judicial notice of it.

We now refer to the case of Walker vs. Walker, Volume 45, Supreme Court of Nevada, page 105, dealing with the same subject matter as in the case just cited. We offer this case in evidence and ask Your Honor to take judicial notice of this case.

Mr. Watts: Could we shorten this by having Mr. Seligsohn refer to any decision of the Supreme Court of the State of Nevada or any statute of that State in the brief that he submits to the Court, with the same privilege to myself?

[fol. 70] *Mr. Seligsohn:* I would be able to do that, anyhow.

The Court: Then, why clutter the record at this time? I

would like to hear some evidence that pertains to this particular case.

Mr. Seligsohn: Your Honor, the only evidence will be law; that is, in reference to the law and what the situation is, legally, in this case. (Discussion off record.)

Mr. Seligsohn: In the case of Walker vs. Walker,—I have been trying to present these briefly,—will the Court take judicial notice of that case?

The Court: Counsel should know that the Court is bound to do that anyway.

Mr. Seligsohn: I now refer to the case of Andrews vs. Andrews, 188 United States Supreme Court Reports, Page 14, relating to residence and jurisdiction. As I understand, Mr. Watts agrees that these parties William F. Esenwein and May H. Esenwein are the same parties as referred to in 141 Superior Court, 604.

Mr. Watts: The identity is not in question.

Mr. Seligsohn: On the subject of Res Adjudicata, I wish [fol. 71] to call Your Honor's attention to the fact that the case of William H. Esenwein, in divorce, against M. H. Esenwein, being the same parties as in this case, was adjudicated upon the same ground of action as appeared in the Exemplification,—substantially the same ground of action,—to wit, "Desertion", and that the court in that case reversed the decree of the court below which granted the decree; that, thereby, the Superior Court refused the decree to William F. Esenwein in divorce and adjudicated the action of desertion between these same parties covering a portion of the same period of time, towit, from the time that they were separated in 1919 and upward to the present time. We offer this case, not merely as evidence of *Res Adjudicata*, but also state that it was entitled to full faith and credit in all other States under the Constitution of the United States, Article 4, Section 1. This is our own Pennsylvania Superior Court Report, and with reference to Article 4, Section 1, I am asking Your Honor to take judicial notice of this case which is yet and was, in 1940, *Res Adjudicata*, prior to the year 1941 when the courts of Nevada attempted to deal with the same subject matter between the same parties and adjudicate the same action.

Mr. Watts: The offer is objected to as incompetent, irrelevant and immaterial.

The Court: Objection overruled. Note an exception. (Objection overruled and an exception noted.)

[fol. 72] *Mr. Seligsohn:* I will also ask the Court to take judicial notice of the fact that Shepards Pennsylvania Citations, copy of which is in our Allegheny County Law Library, say that no appeal was taken from this decision,—141 Pennsylvania Superior Court, Page 604,—to the Supreme Court or any other court whatsoever.

I also call Your Honor's attention to the case of William F. Esenwein vs. May H. Esenwein, 77, Supreme Court of Pennsylvania,——

The Court: Is that 77?

Mr. Seligsohn: 77.

Mr. Watts: It is Supreme Court 312.

Mr. Seligsohn: Yes, Volume 312, Pennsylvania Supreme Court, page 77, being an action in divorce appealed to said court between these same parties in which a prior attempt to obtain a divorce on substantially the same subject matter had been refused and was refused by the Supreme Court of Pennsylvania in the year 1933, and I ask your Honor to take judicial notice of that case: 312, Pennsylvania Supreme Court,—between the same parties.

Mr. Watts: I interpose the same objection; the general objection.

[fol. 73] *The Court:* The objection is overruled. Exception. (Objection overruled and an exception noted.)

Mr. Seligsohn: In order to show that the actions are substantially the same causes of actions in Pennsylvania in Volume 141, Superior Court Reports as are referred to in the Exemplification proceedings in Nevada, I wish your Honor to take judicial notice of our own Pennsylvania Divorce Act of 1929, P. L. 1237, Section 1 and Section 10 D.

The Court: Is there any question as to the fact that there were the same grounds for divorce presented in Pennsylvania as were presented in Nevada?

Mr. Watts: Very much of a question. With reference to the Pennsylvania Statute, that is objected to also, generally.

The Court: The objection is overruled. (Objection overruled and an exception noted.)

Mr. Seligsohn: Now, by comparison, we refer to the Nevada Compiled Laws, Supplement 1931-1941, Volume 2, Page 1280, Section 9467.06, entitled: "Additional Cause for Divorce" which reads:

"Divorce from the bonds of matrimony may be obtained, in addition to the causes now provided by law [fol. 74] and subject to the same procedure and re-

quirements, for the following causes: When the husband and wife have lived separate and apart for three consecutive years without cohabitation, the Court may, in its discretion, grant an absolute decree of divorce at the suit of either party."

Do you admit that is the law of Nevada, Mr. Watts?

Mr. Watts: Certainly. I already offered it.

Mr. Seligsohn: You did read it into the record without objection.

I now refer, if your Honor please, to the case of Miller vs. Miller, 54 Nevada Supreme Court, 44, reading on page 49——

Mr. Watts: I object to have that read into the record.

The Court: Just offer it in evidence.

Mr. Seligsohn: I offer, especially, the parts on page 49 in the middle of the page and at the bottom of the page dealing with the very pertinent question of the subject matter and dealing especially with the particular point of law as adjudicated in Nevada that by varying the form of action one does not estop the operation of the principles of *Res Judicata*, which point is again referred to at page 51 in said [fol. 75] volume, and I ask your Honor to take judicial notice of this case, Miller vs. Miller. We consider it very important.

I now refer to the case of Silverman vs. Silverman, 52, Nevada, Page 152, Nevada Supreme Court,—

Mr. Watts: Will your Honor assure counsel that it is unnecessary to read that.

The Court: It is unnecessary to read it.

Mr. Seligsohn: (Continuing)—with special reference to Pages 158 and 170 thereof, and ask the Court to take judicial notice.

I call your Honor's attention to our own case, to 316, Pennsylvania Supreme Court, Page 153, being the case of Wallace's Estate, with regard to the principles of *Res Judicata*, that the principles are the same in Nevada as they are in Pennsylvania.

I will call your Honor's attention to the Full Faith and Credit Clause in the Constitution of the United States, Article 4, Section 1, and take the position that it covered the State of Pennsylvania; that in 1940 you were entitled to full faith and credit in every State of the Union, in the United States, especially in this case where the State of

Nevada attempted to deal with the same subject matter in 1941.

In view of the law as we have read it, if the Court finds it to be as represented, we will ask that this Petition be dismissed, especially on the ground that it has been adjudicated, is now *Res Judicata* and was prior to the time that [fol. 76] Nevada attempted to deal with it; that the attempt on the part of Nevada, after this case was adjudicated, to tell our courts to throw our decisions out of the window and accept the mandate of foreign jurisdiction is in contempt to our sovereign State of Pennsylvania and its courts.

The Court: I am going to refuse the Petition for Revocation of Order of Support and note an exception.

(Petition refused and an exception noted.)

Testimony closed.

CERTIFICATES

I HEREBY CERTIFY that the proceedings in the above entitled matter were reported stenographically by me and that the foregoing pages contain the correct transcript of my stenographic report.

C. E. Urban, *Official Reporter.*

The Stenographic fee for the transcript in the foregoing case is $7.60, chargeable against Allegheny County.

C. E. Urban, *Official Reporter.*

[fol. 77] ORDER APPROVING RECORD ON PROCEEDINGS

The foregoing record of the proceedings upon the hearing of the above cause is hereby approved, made a part of the record and directed to be filed.

Blair F. Gunther, *Trial Judge.*

IN COUNTY COURT OF ALLEGHENY COUNTY

ORDER REFUSING PETITION FOR REVOCATION OF ORDER OF SUPPORT, ETC.—Filed February 26, 1943

And now to-wit this 26th day of February, 1943, the above entitled case came on for hearing on the Petition for the Revocation of the Order for Support, (and as amended),

and on the Rule on defendant to show cause why he should not be attached for failure to comply with the Order for Support; and after hearing, it is ordered that the original petition for the Revocation of the Order for Support (and as amended), is refused, and the Rule on defendant to show cause why he should not be attached for failure to comply with the Order for Support, is made absolute; County pay the costs.

By the Court, Gunther, *J.*

In County Court of Allegheny County

Opinion—Filed March 26, 1943

Gunther, *J.*,

The prosecutrix in the instant case initiated an action against the defendant under date of March 13, 1922, alleging desertion without reasonable cause in March of 1920 and charging desertion and non-support. An order of support was entered and frequently modified thereafter. The most recent order was entered December 8, 1942, whereby arrearages in payment were reduced to One Thousand Dollars and the monthly rate reduced to Seventy five Dollars. [fol. 78]

It is now contended through a Petition for Revocation of Order of Support and hearing held thereon that the Order of Court in the within case would be revoked. In support of this contention defendant introduced into evidence the Exemplification of the Record of the case of William F. Esenwein v. May H. Esenwein as filed in the Eighth Judicial District Court of the State of Nevada in and for the County of Clark, No. 12316, entered under date of September 8, 1941, wherein it appears that a decree of absolute divorce was granted libellant, William F. Esenwein, the defendant in this action. It is further contended by the defendant in this action, that the decision of the Supreme Court of the United States filed December 21, 1942, in the case of Williams, *et al.* v. The State of North Carolina, No. 29 October Term, 1942, Supreme Court Reporter, Vol. 63, Page 207, makes it imperative upon this Court to revoke the Order of Court in the instant cause of action, for the reason that full faith and credit must be given to the judg-

ment and decree of the sister state, in this instance, the State of Nevada.

If full faith and credit must be given to the Public Acts Records and Judicial Proceedings of Nevada by Pennsyl-[fol. 79] vania, apropos the status of the parties in this case, full faith and credit in reference to said status should have been given to the Public Acts Records and Judicial Proceedings of Pennsylvania by Nevada in its process of dissolving the marriage contract between the prosecutrix and defendant in this case.

The Eighth Judicial District Court of the State of Nevada should have had before it and should have considered the case of William F. Esenwein v. May H. Esenwein at No. 276 April Term, 1940, 141 Pa. Superior Court, Page 604, wherein said Court reversed the decree of the lower court granting divorce on the ground of desertion; wherein it is pointed out that William F. Esenwein left the common abode in 1919, alleging for such action intolerable and cruel treatment by May H. Esenwein, and, that it was determined by the decision of the Supreme Court at No. 312 Pa. 77 on March 20, 1933, his allegations in this respect were not sustained, affirming the order of the Superior Court at No. 105 Pa. Superior Court, 264, reversing the decree of the lower court in favor of William F. Esenwein and dismissing the libel in divorce.

William F. Esenwein failed to prove a willful and malicious desertion by his spouse, May H. Esenwein, as so held by the Superior Court of Pennsylvania, and said decision under date of October 4, 1940, unappealed from, has become final.

The parties, cause, and the issue are the same at No. 276 April Term, 1940, 141 Pa. Superior Court, 604, entered under date of October 4, 1940, first heard, and the subse-[fol. 80] quent case of No. 12316 of the Eighth Judicial District Court of the State of Nevada under date of September 8, 1941, and the doctrine of *res judicata* is applicable. Public policy demands an end to litigation. The whole cause of action in the Nevada case is the same as in the Pennsylvania case first had, and the issues actually adjudicated in the prior Pennsylvania proceeding were readjudicated in the Nevada proceeding.

Wallace's Estate, 316 Pa. 148, 153; Bickley v. Pennsylvania P. A. C., 148 Pa. Super. 399, 405; 1st Trust Co. v. Phila. Distilling Co., 327 Pa. 145, 148; Silverman v. Sil-

verman, 52 Nevada 152; Miller v. Miller, 54 Nevada 44; Vickers v. Vickers, 45 Nevada 274. Accordingly the prayer for a revocation of the order of Support in this Court cannot be sustained.

[fol. 81] In the Superior Court of Pennsylvania

No. 326

No. 233 April Term, 1943
No. 234 April Term, 1943
No. 235 April Term, 1943

Commonwealth ex rel. May H. Esenwein

v.

William F. Esenwein, Appellant

Appeal from the Order of the County Court of Allegheny County at No. 287 of 1922, entered under date of December 8, 1942; Appeal from the Order of the County Court of Allegheny County at No. 287 of 1922, entered under date of February 26, 1943, refusing defendant's prayer for the opening of the Order of December 8, 1942; Appeal from the Order of the County Court of Allegheny County at No. 287 of 1922, entered February 26, 1943, refusing defendant's prayer for the vacation of the Order of December 8, 1942

No. 326

Opinion—Filed July 16, 1943

Opinion by Kenworthey, J.:

In 1901, the Supreme Court of the United States held that the jurisdiction of a state court granting a divorce may be inquired into and, if it appear that neither of the parties had acquired a bona fide domicil in that state at the time of instituting proceedings the decree is open to collateral attack and a recital in the proceedings that such domicil existed may be contradicted. Bell v. Bell, 181 U. S. 175, 21 S. Ct. 551; Andrews v. Andrews, 188 U. S. 14, 23 S. Ct. 237.

In 1906, it held that a state court, *even of the plaintiff's domicil*, could not render a judgment in divorce that would

be entitled to enforcement in other states against a nonresident who did not appear and was not personally served [fol. 82] of the process.[1] Haddock v. Haddock, 201 U. S. 562, 26 S. Ct. 525.

On December 21, 1942, it overruled Haddock v. Haddock (Williams v. State of North Carolina, 317 U. S. 287, 63 S. Ct. 207), it held that if plaintiff in a divorce proceeding acquires a bona fide domicil in the state which grants him a divorce, the decree is entitled to full faith and credit. This did not in the least impair the authority of the earlier decision in Bell v. Bell that domicil, not merely the residence, of one of the parties (there the plaintiff) must be established to support a binding decree where there is substituted service.

Were it not for the misleading press notices and the generally confused discussion of the Williams Case emanating, perhaps, from the somewhat extravagant language in the dissenting opinion of Mr. Justice Jackson,[2] it would scarcely be necessary to point out the limited effect of this decision. We shall discuss it briefly.

Mr. Williams and Mrs. Hendricks had long been domiciled in the State of North Carolina; they were both married to others. In 1940, they went to Las Vegas, Nevada, and after remaining the few weeks required by Nevada law, were granted divorces, intermarried and returned to North Carolina where they set up housekeeping as husband and wife. They were promptly indicted and convicted of bigamy. They defended by offering in evidence the Nevada decrees. The jury were instructed to find them guilty if either (1) they had not acquired a bona fide domicil in Nevada, or (2) if their matrimonial domicil was in North [fol. 83] Carolina and the Nevada divorces had been procured without personal service in Nevada or without an appearance by the defendant-spouse. When the case was

[1] Unless, of course, the state is also the state of the matrimonial domicil. Atherton v. Atherton, 181 U. S. 155, 21 S. Ct. 544.

[2] For example: "It is not an exaggeration to say that this decision repeals the divorce laws of all states and substitutes the law of Nevada as to all marriages one of the parties to which can afford a short trip there." 63 S. Ct. 219.

argued in the Supreme Court, the state did not seek to sustain the judgment on the ground the domicil was a sham. As said by Mr. Justice Douglas, "* * * it [the state] admits that there probably is enough evidence in the record to require the petitioners to be considered 'to have been actually domiciled in Nevada.'" (63 S. Ct. 210). He painstakingly pointed out that the court was not overruling Bell v. Bell. "If the case had been tried and submitted on that issue [validity of the domicil] only, we would have quite a different problem, as Bell v. Bell indicates." (Page 210). "Domicil of the plaintiff, immaterial to jurisdiction in a personal action is recognized in the Haddock case and elsewhere (Beale, Conflict of Laws, § 110.4) as essential in order to give the court jurisdiction which will entitle the divorce decree to extraterritorial effect, at least when the defendant has neither been personally served nor entered an appearance. The findings made in the divorce decrees in the instant case must be treated on the issue before us as meeting those requirements. For it seems clear that the provisions of the Nevada statute that a plaintiff in this type of case must 'reside' in the State for the required period requires him to have a domicil as distinguished from a mere residence in the state. Latterner v. Latterner, 51 Nev. 285, 274 P. 194; Lamb v. Lamb, 57 Nev. 421, 65 P. 2d 872. Hence the decrees in this case like other divorce decrees are more than in personam judgments. They involve the marital status of the parties. Domicil creates a relationship to the state which is adequate for numerous exercises of state power." (Page 213). "We thus have no question on the present record whether a divorce decree granted by the courts of one state to a [fol. 83a] resident as distinguished from a domiciliary is entitled to full faith and credit in another state. Nor do we reach here the question as to the power of North Carolina to refuse full faith and credit to Nevada divorce decrees because, contrary to the findings of the Nevada court, North Carolina finds that no bona fide domicil was acquired in Nevada." (Page 215).

The case was sent back; presumably for the very purpose of retrial on the issue whether the Nevada domicils were bona fide. Not only do we think the language of the majority opinion reaffirms Bell v. Bell, but if the court had been of opinion that a mere residence for the required

period would support a valid decree it would have directed that defendants be discharged.

We now come to a consideration of the facts of the present case.

The parties were married in 1899. They have not lived together since 1919. In 1920, the husband instituted divorce proceedings in Allegheny County and obtained a decree of divorce in 1932 on the ground of indignities. On appeal, this court reversed and dismissed the libel (105 Pa. Superior Ct. 261, 161 A. 425); the order was affirmed by the Supreme Court (312 Pa. 77, 167 A. 350). In 1939, the husband again instituted divorce proceedings in Allegheny County, charging desertion; the lower court again granted a divorce which was reversed by this court (141 Pa. Superior Ct. 604, 15 A. (2d) 735).

In June 1941, the husband went to Las Vegas, Nevada, and on September 8, 1941, was granted a divorce on the ground that the parties "had lived separate and apart for more than three consecutive years last past and immediately [fol. 84] preceding the commencement of this action, without cohabitation," a ground not recognized by our divorce laws. The wife was not served in Nevada and she did not enter an appearance although she was served in Pennsylvania.

The present petition is for the revocation of an order for support made in March 1922 and subsequently modified several times. The basis of the petition for revocation is the Nevada divorce decree. Com. ex rel. v. Parker, 59 Pa. Superior Ct. 74. In her answer, the wife contended that the Nevada decree is invalid for two reasons: (1) The court had no jurisdiction because the husband did not establish a bona fide domicil,[1] and (2) res adjudicata. The lower court refused to revoke the order. The husband appealed.

[1] The answer does not specifically mention either jurisdiction or domicil; it alleges that the Nevada proceedings "were conceived and executed in fraud both upon the states and courts of Nevada and Pennsylvania." The questions of jurisdiction and domicil were orally presented to us and subsequently discussed at length in a supplemental brief and we shall consider the question as though it had been specifically raised. See Taggart v. De Fillippo et al., 315 Pa. 438, 173 A. 423.

The Nevada decree is prima facie valid and the burden of proving the contrary was on appellee. Com. ex rel. Cronhardt v. Cronhardt, 127 Pa. Superior Ct. 501, 193 A. 484. The evidence reveals that appellant had been domiciled in Allegheny County for many years, but that since October 1941 he has been living in Cleveland, Ohio. Although the record does not reveal it, we were told at the oral argument that during his brief stay in Nevada he stayed at a hotel. We were also told at the oral argument that we could assume he left Nevada immediately after obtaining his divorce. Under the circumstances, we are of opinion that, in spite of his testimony given in the divorce proceeding that he had moved to Nevada intending to make Las Vegas his permanent place of residence and had retained that intention up to the date of the hearing (Sep- [fol. 85] tember 8, 1941), his Nevada residence was merely for the purpose of obtaining the divorce; he did not establish a bona fide domicil in the absence of proof of other circumstances which, under our decisions, are regarded as the essentials of domicil. See Dorrance's Estate, 309 Pa. 151, 163 A. 303. See also the learned discussion by Judge Gordon in Meng v. Meng, D & C. And until the Supreme Court of the United States gives us a different test of domicil, we apply our own. See Restatement, Conflict of Laws, § 10.

In our opinion the Nevada decree was invalid for the reasons just stated and the order of the court will be affirmed. We have not been asked to recognize the Nevada decree on the ground of *comity*. There is, perhaps, some doubt whether we could even if we were so inclined. See Goodrich, Conflict of Laws, § 19. It is obviously not a case for the application of the principle. The ground upon which the divorce was granted in Nevada is not a ground recognized by this commonwealth; appellant undoubtedly went there for the purpose of evading our laws under which his previous attempts to obtain a divorce were frustrated; the legitimacy of children is not involved; and there are no other circumstances which at all appeal to us. Compare Com. v. Custer, 145 Pa. Superior Ct. 535, 21 A. (2d) 424, where the authorities are discussed at length by President Judge Keller.

In view of our conclusion, it is unnecessary to discuss at length the question whether the Nevada decree was invalid on the additional ground that, because of the previous de-

cisions of this court against him, appellant's right to a divorce was res adjudicata. Refusal of a divorce on one ground is not a bar to procuring it in another action on a different ground. Viney v. Viney, 151 Pa. Superior Ct. 86, [fol. 86] 29 A. (2d) 437; Restatement, Judgments, § 74 comment d. Moreover, res adjudicata is a legal defense which must be raised in the initial proceeding or it is deemed to have been waived. Walter v. Baldwin, 126 Pa. Superior Ct. 589, 193 A. 146. It cannot be made the basis of a collateral attack on a judgment or decree which is otherwise valid. Richardson's Estate, 132 Pa. 292, 19 A. 82; Fauntleroy v. Lum, 210 U. S. 230, 28 S. Ct. 641; Restatement, Conflict of Laws, § 431. And it would follow that, if the Nevada court had jurisdiction of the subject matter and the parties, appellee's attempt to raise the defense in the court below came too late.

The orders are affirmed, costs in each appeal to be paid by appellant.

[fol. 86a] In Supreme Court of Pennsylvania

Assignments of Error

1. The Superior Court erred in dismissing appellant's assignment of error, filed in that court, which said assignment and the court's judgment thereon, as contained in its final order, are as follows:

"The court below erred in entering its order of February 26, 1943, which said order reads as follows (R. 77a):

"Order of Court

And, now to wit this 26th day of February, 1943, the above entitled case came on for hearing on the Petition for the Revocation of the Order for Support, (and as amended), and on the Rule on defendant to show cause why he should not be attached for failure to comply with the Order for Support; and after hearing, it is ordered that the original petition for the Revocation of the Order for Support (and as amended), is refused, and the Rule on defendant to show cause why he should not be attached for failure to comply with the Order for Support, is made absolute; County pay the costs.

By the Court, Gunther, J."

"The orders are affirmed, costs in each appeal to be paid by appellant."

2. The judgment of the Superior Court deprives appellant of the rights and privileges conferred upon him by Article 4, Section 1 of the Constitution of the United States, and by the Act of Congress, relating to certification of judicial proceedings, being R. S. Sec. 905, 28 U. S. C. A., Sec. 687.

Sidney J. Watts, Fred C. Houston, Attorneys for Appellant.

September 9, 1943.

[fol. 87] In Supreme Court of Pennsylvania

Commonwealth ex Rel. May H. Esenwein

v.

William F. Esenwein, Appellant.

Docket Entries

Appeal from the judgment of the Superior Court, at No. 235 April Term, 1943 (Allegheny County). August 12, 1943, Appeal allowed (Miscellaneous Docket No. 1280A). August 18, 1943, Appeal filed and writ exit. August 24, 1943, Petition of appellant to place case on list for week beginning September 27th, 1943 at Pittsburgh and for an order permitting him to file eight copies of the printed Record as filed in this case in the Superior Court, filed. August 26, 1943, Answer to petition filed. August 27, 1943, Record; Testimony; Envelope marked "Deposition of William F. Esenwein taken before Roy C. Green, Commissioner, on Wednesday, November 19, 1942, at Cleveland, Ohio"; letter from Squire, Sanders & Dempsey addressed to William H. Frasher, Clerk, dated December 2, 1942, filed. FVI.

Order

Sept. 3, '43

Per Curiam:

The prayer of the within petition is granted.

Sept. 9, 1943, Assignments filed.

October 1, 1943, Argued — 219.

October 23, 1943, Petition of Wells C. Phelps for leave to intervene, filed.

ORDER

Oct. 26, '43.

PER CURIAM:

The petitioner is granted leave to file a brief if he so desires.

DECISION

January 3, 1944

Judgment affirmed at appellant's costs.

Linn, J.

C. J. Maxey and Mr. Justice Drew Dissent. (Dissenting Opinion filed by Mr. Justice Drew in which Mr. Chief Justice Maxey joins).

[fol. 88] ORDER

And now, January 6, 1944, it is ordered that the Prothonotary of this Court shall hold the record in this case for the period of ninety days, during which time the defendant-appellant shall have the right to file in the Supreme Court of the United States a petition for certiorari, as provided by law.

George W. Maxey, C. J.

January 18, 1944. Praecipe of defendant designating portions of record to be incorporated in certified transcripts of record for Supreme Court of United States, filed.

For Appellant: Fred C. Houston, Sidney J. Watts, Baker & Watts. For Appellee: N. J. Lippard, Jacob Seligson.

[fol. 89] IN THE SUPREME COURT OF PENNSYLVANIA, WESTERN DISTRICT, MARCH TERM, 1944

No. 5

COMMONWEALTH ex Rel. MAY H. ESENWEIN

v.

WILLIAM F. ESENWEIN, Appellant

Appeal from the Judgment of the Superior Court at No. 235, April Term, 1943, Which Affirmed the Order of the County Court of Allegheny County at No. 287 of 1922, Entered Feberuary 26, 1943, Refusing Defendant's Prayer for the Vacation of the Order of December 8, 1942

OPINION OF THE COURT—Filed January 3, 1944

LINN, J.:

William F. Esenwein appeals from judgment of the uperior Court affirming the action of the County Court of Allegheny County refusing to revoke an order made for the support of his wife. The parties were married in Pittsburgh in 1899; they separated in 1919. The support order has been in effect since 1922. In 1932 he sued for a divorce on the ground of indignities, but failed: *Esenwein v. Esenwein*, 105 Pa. Superior Ct. 261, 161 A. 425; affirmed, 312 Pa. 77, 167 A. 350. He sued again in 1939 on the ground of desertion but failed again: 141 Pa. Superior Ct. 604, 15 A. 2d 735.

On November 12, 1942, he applied to the County Court for a reduction in the amount of the order. He averred, inter alia, that he had become a resident of Nevada on June 30, 1941, and on September 8, 1941, had obtained a decree of divorce. The court, on December 8, 1942, reduced the order to $75 a month.

On February 1, 1943, he filed the petition now before the court for revocation of the support order on the ground of the Nevada divorce decree, relying on *Williams and Hendricks v. North Carolina*, 317 U. S. 287. To that petition his wife filed an answer averring, inter alia, "that the said proceedings in Nevada resulting in a so-called decision or decree in divorce in favor of petitioner were conceived and executed in fraud both upon the states and courts of

[fol. 90] Nevada and Pennsylvania." After hearing, that issue was found in favor of the wife and the petition to revoke was dismissed. The husband appeals.

The question is whether the rejection of the Nevada decree, as ground to revoke the order, is consistent with the full faith and credit requirement of the federal Constitution and the Act of Congress.

There is no doubt of the power of the courts below to inquire into the jurisdictional facts necessary to confer jurisdiction on the Nevada court: *Bell v. Bell*, 181 U. S. 175; *Streitwolf v. Streitwolf*, 181 U. S. 179; *Andrews v. Andrews*, 188 U. S. 14; *German Savings and Loan Society v. Dormitzer*, 192 U. S. 125; *Com. ex rel. v. Yarnell*, 313 Pa. 244, 251; Beale, Conflict of Laws, (1935) sections 111.1 and 111.2.

In making that inquiry the material to be examined is the record presented; it consists of the support order * concededly valid; the husband's petition to revoke, the wife's answer, the evidence, which included the Nevada proceeding and decree, produced at the hearing in the County Court. We must also take into consideration the facts formally admitted at the argument before the Superior Court.**

If Esenwein had presented nothing to the County Court but the duly certified divorce decree, he would have shown himself entitled to a revocation of the order unless his wife there produced evidence overcoming the prima facie effect of the decree. But he did not rest on the decree alone; he put in evidence the entire record of the Nevada proceeding leading up to the decree thus affording his wife opportunity [fol. 91] to make from it any inferences of fact relevant in the inquiry whether the jurisdictional fact of bona fide domicil existed. These inferences, with the admitted facts stated in the opinion of the Superior Court, clearly show that the jurisdictional fact of a Nevada domicil was lacking.

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* "The order of March, 1922 . . . the subject of frequent consideration as the Docket Entries, pages 1a et seq. show."

** "Although the record does not reveal it, we were told at the oral argument that during his brief stay in Nevada he stayed at a hotel. We were also told at the oral argument that we could assume he left Nevada immediately after obtaining his divorce."

Appellant went to Nevada about the end of June, 1941; lived in a Hotel, was divorced September 8, 1941, and left Nevada immediately afterward and established a residence in Ohio. His wife was not served in Nevada and did not appear though notified in accord with Nevada law. In the Nevada proceeding he testified: "Q. When you came to Nevada you came with the intention of making Clark County, Nevada, your permanent place of residence? A. Yes, sir. Q. Have you retained that intention ever since? A. Yes, sir. Q. And you have it now? A. Yes, sir." He gave that testimony on September 8th, received the decree on the same day and left Nevada immediately. His acts spoke louder than his words. If his testimony that on September 8th he had the "intention" of residing in Nevada, had been supplemented by the fact that he would leave the state immediately afterward, the court would have been justified in declining to make a finding that his Nevada domicil was bona fide. The court might very well have said, had it known the additional fact, that while the six-weeks residence required by the Nevada statute was established, his intention to leave immediately afterward prevented a finding that his domicil was in good faith. The prima facie inference is, and the Superior Court was authorized to make it, that, notwithstanding his testimony, he had no intention of making his domicil in Nevada. His Nevada case is no different in legal effect from what it would have been if he had never been in that state but had arranged to have someone falsely impersonate him at the hearing. In our inquiry into the legal effect of the record, a more difficult factual question might have been presented if Mr. Esenwein had given evidence in the County Court to the effect that notwithstanding his testimony in Nevada on September 8th, conditions developed immediately afterward which made it desirable that he should again change his domicil from Nevada to some other state. But he gave [fol. 92] no such evidence; though he was the moving party, he produced nothing to rebut the facts clearly inferable against him on the whole case. The Superior Court was therefore justified in adopting the natural or normal inference that appellant's proceeding in Nevada was a sham and fraud for the purpose of evading the order of the County Court of Allegheny County.

"The essential fact that raises a change of abode to a change of domicil is the absence of any intention to live

elsewhere, Story on Conflict of Laws, § 43—or, as Mr. Dicey puts it in his admirable book 'the absence of any present intention of not residing permanently or indefinitely in the new abode. Conflict of Laws, 2d ed. 111.'" *Williamson v. Osenton*, 232 U. S. 619, 624. "The intention required for the acquisition of domicil of choice is an intention to make a home in fact, * * *." Restatement, Conflict of Laws, section 19. *Dorrance's Estate*, 309 Pa. 151, 163 A. 303. The essentials of a change of domicil from Pennsylvania or elsewhere to Nevada are not satisfied by the short sojourn in a Nevada hotel. For the purposes for which he now offers the divorce decree, it is not enough that on September 8, 1941, his word was accepted in Nevada, considering that the prima facie inference from his subsequent conduct is that, while testifying, he was misleading that court as to his domiciliary intent. Our conclusion is not inconsistent with the decision in Williams v. North Carolina, 317 U. S. 287; on page 302 it was said, "In the first place, we repeat that in this case we must assume that petitioners had a *bona fide* domicil in Nevada, not that the Nevada domicil was a sham. We thus have no question on the present record whether a divorce decree granted by the courts of one state to a resident, as distinguished from a domiciliary, is entitled to full faith and credit in another state. Nor do we reach here the question as to the power of North Carolina to refuse full faith and credit to Nevada divorce decrees because, contrary to the findings of the Nevada court, North Carolina finds that no *bona fide* domicil was acquired in Nevada." The question thus reserved in the [fol. 93] Williams case is the one decided by the courts below against the appellant.

Judgment affirmed at appellant's costs.

C. J. Maxey and Mr. Justice Drew Dissent.

[fol. 94] In the Supreme Court of Pennsylvania, Western District, March Term, 1944

No. 5

Commonwealth ex rel. May H. Esenwein

v.

William F. Esenwein, Appellant

Appeal from the Judgment of the Superior Court at No. 235 April Term, 1943, which affirmed the Order of the County Court of Allegheny County at No. 287 of 1922, entered February 26, 1943, refusing defendant's prayer for the vacation of the Order of December 8, 1942.

Dissenting Opinion—Filed January 3, 1944

Drew, J.:

The Chief Justice and myself thoroughly disagree with the opinion and decision of the majority, because, in our best judgment, the record in this case is absolutely void of anything better than conjecture and suspicion to support the finding that appellant lacked a bona fide domicil in the State of Nevada at the time he instituted his action for divorce and obtained a decree there. If the judgment of a sovereign state can be lightly set aside, as appears to have been done here, then the full faith and credit clause of the National Constitution and the decision of the Supreme Court of the United States, in *Williams v. North Carolina*, 317 U. S. 287, 63 S. Ct. 207, are no protection. It seems to me that the majority completely ignores the fact that merely because its views as to the marriage relationship and the avenues of escape may differ from those of other states, or because there may be a hostile feeling toward decrees in divorce by many courts and among laymen, where the period of residence is comparatively brief, is no legal justification for circumventing the Federal Constitution.

There is no doubt in my mind that a decree in divorce of [fol. 95] one state can be collaterally attacked on the ground of want of good faith of domicil in another. While as a general rule a judgment or decree may not be impeached

collaterally, a different rule exists if the attack is based upon fraud or want of jurisdiction: *German Savings and Loan Society v. Dormitzer*, 192 U. S. 125, 24 S. Ct. 221; *Hunt v. Hunt*, 72 N. Y. 217; 34 C. J. § 815, p. 511. Jurisdiction of the court by which a judgment or decree is rendered in any state may be attacked collaterally in another state: *Thompson v. Whitman*, 85 U. S. 457; *Andrews v. Andrews*, 188 U. S. 14, 23 S. Ct. 237. A bona fide domicil being a jurisdictional fact, its existence is subject to challenge before the courts of other states, regardless of any recital or finding of "domicil" expressed or implied in the record: Freeman on Judgments, 5th ed., Vol. 3, § 1437, p. 2959; Black on Judgments, 2d ed., Vol. 2, § 931, p. 1373. It is proper to inquire into the jurisdiction of the court granting a decree in divorce and if it appear that neither party had acquired a bona fide domicil in that state at the time the proceedings were instituted, the decree is open to collateral challenge: *Bell v. Bell*, 181 U. S. 175, 21 S. Ct. 551; *Streitwolf v. Streitwolf*, 181 U. S. 179, 21 S. Ct. 553; Beale on Conflict of Laws, Vol. 1, § 111.2, p. 478; Wharton on Conflict of Laws, 3d ed., Vol. 1, § 223, pp. 463-4; and, in my opinion, there is nothing in *Williams v. North Carolina*, supra, which in any way should lead one to believe that the court there intended to overrule this previously enunciated principle.

When the foregoing legal principles are applied to the facts of the instant case, it at once clearly appears that unless there was a bona fide domicil acquired by appellant in Nevada when he brought his action for divorce there, his decree was subject to impeachment in this Commonwealth, since admittedly appellee was neither personally served nor entered an appearance in the Nevada proceeding. However, from a most careful study of the entire [fol. 96] record here, I am satisfied that there is nothing which could possibly justify the majority of this Court in finding that appellant lacked a bona fide domicil in Nevada.

At the hearing in the County Court, no witnesses were called by either side. Counsel for appellant offered in evidence certain undenied allegations of the petition; an exemplification of the record of the Nevada proceeding, wherein there was a specific finding that appellant was domiciled in that state when he instituted his action there, and competent testimony to support such finding; and requested the court to take judicial notice of various decisions and laws of the State of Nevada; and then rested.

Since a foreign decree, regular on its face, is entitled to a presumption of validity (*Delanoy* v. *Delanoy*, 216 Cal. 27, 13 P. 2d 719; *Corkum* v. *Clark*, 263 Mass. 378, 161 N. E. 912), the burden was then shifted to appellee to show by a preponderance of the evidence that appellant was not in fact so domiciled (*Com. ex rel. Cronhardt* v. *Cronhardt*, 127 Pa. Superior Ct. 501, 193 A. 484). As to where the burden of proof rests under such circumstances, it was said in *Cheever* v. *Wilson*, 76 U. S. 108: "It is said the petitioner went to Indiana to procure the divorce, and that she never resided there. The only question is as to the reality of her new residence and of the change of domicil. That she did reside in the county where the petition was filed is expressly found by the decree . . . The finding is clearly sufficient until overcome by adverse testimony."

Counsel for appellee, relying primarily upon the untenable defense that the previous decisions of our Pennsylvania courts in refusing to grant appellant's applications for divorce were res judicata of his suit instituted in Nevada, merely offered the following excerpts from appellant's testimony as contained in the Nevada record already in evidence (all of which fully supported the Nevada court's finding of bona fide domicil, rather than challenged it):

[fol. 97] "Q. Where do you live, Mr. Esenwein?

A. Las Vegas.

Q. When did you first become a resident of Las Vegas, Clark County, Nevada?

A. June 23, 1941.

Q. Were you present in the City of Las Vegas, Clark County, Nevada, every day from and including June 23, 1941, to and including August 5, 1941?

A. Yes, sir.

Q. And you have been here continuously since August 5th?

A. Yes, sir.

Q. When you came to Nevada you came with the intention of making Clark County, Nevada, your permanent place of residence?

A. Yes, sir.

Q. Have you retained that intention ever since?

A. Yes, sir.

Q. And you have it now?

A. Yes, sir." In addition to requesting the court to take judicial notice of certain decisions of the State of

Nevada, counsel for appellee read into the record the following statements made by appellant in a deposition taken on November 19, 1942, in Cleveland, Ohio, and which was filed by appellant in this proceeding:

"Q. Where do you live, Mr. Esenwein?

A. 2635 North Moreland Boulevard, Cleveland, Ohio.

Q. Mr. Esenwein, how long have you lived at 2635 North Moreland?

A. Since some time in October, 1941.

Q. And prior to that time you were a resident of Las Vegas, Nevada?

A. Yes, sir."

To acquire a domicil, a party must have his abode in one place, with intention of remaining there; and the elements of domicil are residence and animus manendi: *Di Brigida v. Di Brigida*, 116 N. J. Eq. 206, 172 A. 505. In the instant case, it is not denied that appellant took up a residence in the State of Nevada at the time he brought his action there and retained it until a short time after he obtained his decree. Giving the evidence adduced by appellee the fullest effect possible, at best it raises but a mere suspicion that the animus manendi may have been wanting. Conjecture and suspicion are not enough to rebut the presumption of the validity of a decree of a sister state (*Cheever v. Wilson*, supra). Certainly, such evidence is not the clear and convincing proof which is required. See 21 C.J.S. §100, p. 155.

It is obvious that because appellant on November 19, 1942, in Cleveland, Ohio, stated that he had lived in that [fol. 98] city since some time in October, 1941, does not in any way detract from the truthfulness of his testimony given in the Nevada proceeding on September 8, 1941, that he went to that state on June 23, 1941, with the intent of making it his permanent domicil and that he still retained that intention at that time. The record shows that appellant sold his business in the City of Pittsburgh, abandoned his domicil in Pennsylvania and took up one in Nevada, which he later changed to Ohio, and there has resided now for more than two years. This he had a perfect right to do. The mere fact that he procured a divorce in Nevada does not rebut the presumption of the good faith on his part in the acquisition of a domicil there. "The motive with which a change of residence is made is immaterial so long as there is a real intention to make the new residence a home":

Beale, Conflict of Laws, Vol. 1, §22.1, p. 161. Whether appellant's residence in Nevada was long or short is of no moment, since the finding of the court that he had an intention to make that state his domicil during his residence there has not been rebutted. See *Price* v. *Price*, 156 Pa. 617, 27 A. 291.

Appellant did not give up his domicil in this Commonwealth to evade the order of support here under consideration, for he continued to comply with it for the more than two years he had been a non-resident, and only applied for revocation of the order after the rendition of the decision by the United States Supreme Court, in *Williams* v. *North Carolina*, supra.

The Court of Appeals of New York, in its recent decision in In the *Matter of the Estate of Anna Holmes, Deceased*, (decided November 24, 1943), on facts quite analogous to those of the instant case, upheld the validity of a Nevada decree in divorce which was there being challenged. From the agreed state of facts there before the court, it appears that respondent-husband left New York State and went to Nevada in June, 1937, and there commenced an action for divorce against his wife, who was a domiciliary of New York, on the ground of extreme cruelty; that the wife did [fol. 99] not appear by attorney or in person and was not served personally with a summons, but merely by publication; that respondent obtained a decree in Nevada on September 18, 1937, and on the same day remarried; that in December, 1937, after respondent and his second wife had moved to New York State, the first wife commenced an action against respondent for a divorce on the ground of adulterous conduct with the second wife; that respondent filed an answer averring that he had already obtained a decree in Nevada; that the referee, to whom the case was referred in New York, found that respondent and his first wife had been residents of New York from the date of their marriage to the time of trial; that because of the adultery of respondent, the first wife was entitled to a decree; that a judgment in her favor became final in September, 1939, and no appeal therefrom was ever taken; that the second wife continued to reside in New York State until her death in January, 1942; that thereafter one Frances M. Lawson applied to the Surrogate's Court for letters of administration upon the estate of the second wife and the respondent-husband filed an answer alleging in substance that he was

the husband of the deceased and entitled to letters. On the issue as to whom letters should be granted, the Surrogate held that respondent was not the legal husband of decedent at the time of her death and, therefore, denied his petition, and the Appellate Division reversed and held that the Nevada decree must be recognized in New York State. In upholding the action of the Appellate Division, the Court of Appeals, speaking through Chief Judge Lehman, said:

"In the case we are now reviewing, the appellant [Frances M. Lawson] has not, in the agreed statement of facts or by presentation or offer of evidence, except the decision of the referee in the divorce action, challenged the decision of the Nevada court that the plaintiff had acquired a domicile in Nevada sufficient to support the jurisdiction of that court to adjudicate his marital status. Though the appellant has consistently contended that the courts of this State [fol. 109] may refuse to give full faith and credit to the Nevada decree he bases that contention primarily, if not exclusively, upon the decision of the Supreme Court of this State in the divorce action instituted here that the Nevada decree was invalid. Since that decision is, as we have said, not binding upon the respondent and since there is no other affirmative proof that the respondent was not domiciled in Nevada when he brought an action for divorce there, we must apply the rule long authoritatively established by the Supreme Court of the United States: 'There can be no doubt that if full faith and credit were denied to a judgment rendered in another State upon a suggestion of want of jurisdiction, without evidence to warrant the finding, this court would enforce the constitutional requirement. See *German Savings and Loan Society* v. *Dormitzer*, *ante*, page 125.' (*Rogers* v. *Alabama*, 192 U. S. 226 at p. 231, opinion by Holmes, *J.*). We have found no case in which this court has heretofore attempted to define the scope of the rule that a judgment of a sister state granting the plaintiff a divorce from a spouse not domiciled in that state nor appearing in the action nor personally served with process there imports that the court had acquired jurisdiction to render a valid judgment *in rem* changing the status of the plaintiff. In many decisions the court has, however, assumed the existence of a presumption, in the absence of evidence to the contrary, that the court had jurisdiction to render judgment, though, doubtless, the validity of the

judgment may be impeached by extrinsic evidence. (See *Kerr* v. *Kerr*, 41 N. Y. 272, 275; *Cross* v. *Cross*, 108 N. Y. 628, 630; *Matter of Kimball*, 155 N. Y. 62, 68.) Instinct in these and other decisions of this court is the rule that the foreign judgment of divorce will be given full force and effect as a judgment *in rem* dissolving the marriage of the plaintiff until impeached by evidence which establishes that the court had no jurisdiction over the *res*.[3] That rule is in accord with the great weight of judicial authority in this country. (See *Barnes* v. *Barnes*, 172 La. 648; *Howey* v. *Howey*, 240 S. W. 450, [Mo.] cert. denied, 260 U. S. 730; *Harrington* v. *Harrington*, 233 Mo. App. 390; *Commonwealth ex rel. Cronhardt* v. *Cronhardt*, 127 Pa. Super. 501, on re-[fol. 101] hearing, 135 Pa. Super. 117; *Goodloe* v. *Hauck*, 113 F. 2d 753, 755, 756, App. D. C.; *Dry* v. *Rice*, 147 Va. 331, 338; *McFarland* v. *McFarland*, 179 Va. 418, 428.) A different rule has been applied in Massachusetts and perhaps some other jurisdictions, to foreign decrees of divorce. (See *Commonwealth* v. *Blood* (97 Mass. 538); *Kelley* v. *Kelley* (161 Mass. 111); but cf. *Peaslee* v. *Peaslee* (147 Mass. 171, 180); *Corkum* v. *Clark* (263 Mass. 378, 382); but academic authority as well as the weight of judicial authority is opposed to the exclusion of foreign judgments of divorce from the benefit of the presumption of validity generally accorded to judgments of courts of general jurisdiction (3 Freeman on Judgments, § 1426; 2 Black on Judgments, §924; 2 Bishop, New Commentaries on Marriage, Divorce and Separation, §1526). The courts of this state have not refused to apply to judgments of divorce that general presumption."

So, in the instant case, appellee has failed to adduce any affirmative proof that appellant was not domiciled in the State of Nevada at the time he instituted his action there, and therefore this Court is bound to give full faith and credit to the Nevada decree. I would reverse the judgment of the Superior Court and revoke the order of support of the County Court of Allegheny County of December 8, 1942.

Mr. Chief Justice Maxey joins in this dissent.

[fol. 102] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 103] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1944

No. 20

ORDER ALLOWING CERTIORARI—Filed June 12, 1944

The order of March 6, 1944, denying certiorari in this case is vacated and the petition for writ of certiorari herein to the Supreme Court of the Commonwealth of Pennsylvania is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Office - Supreme Court, U. S.
FILED
FEB 3 1944
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. [redacted] 20

WILLIAM F. ESENWEIN,

Petitioner,

vs.

COMMONWEALTH EX REL. MAY H. ESENWEIN.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF PENNSYLVANIA AND BRIEF IN SUPPORT THEREOF.

SIDNEY J. WATTS,
Counsel for Petitioner.

FRED C. HOUSTON,
Of Counsel.

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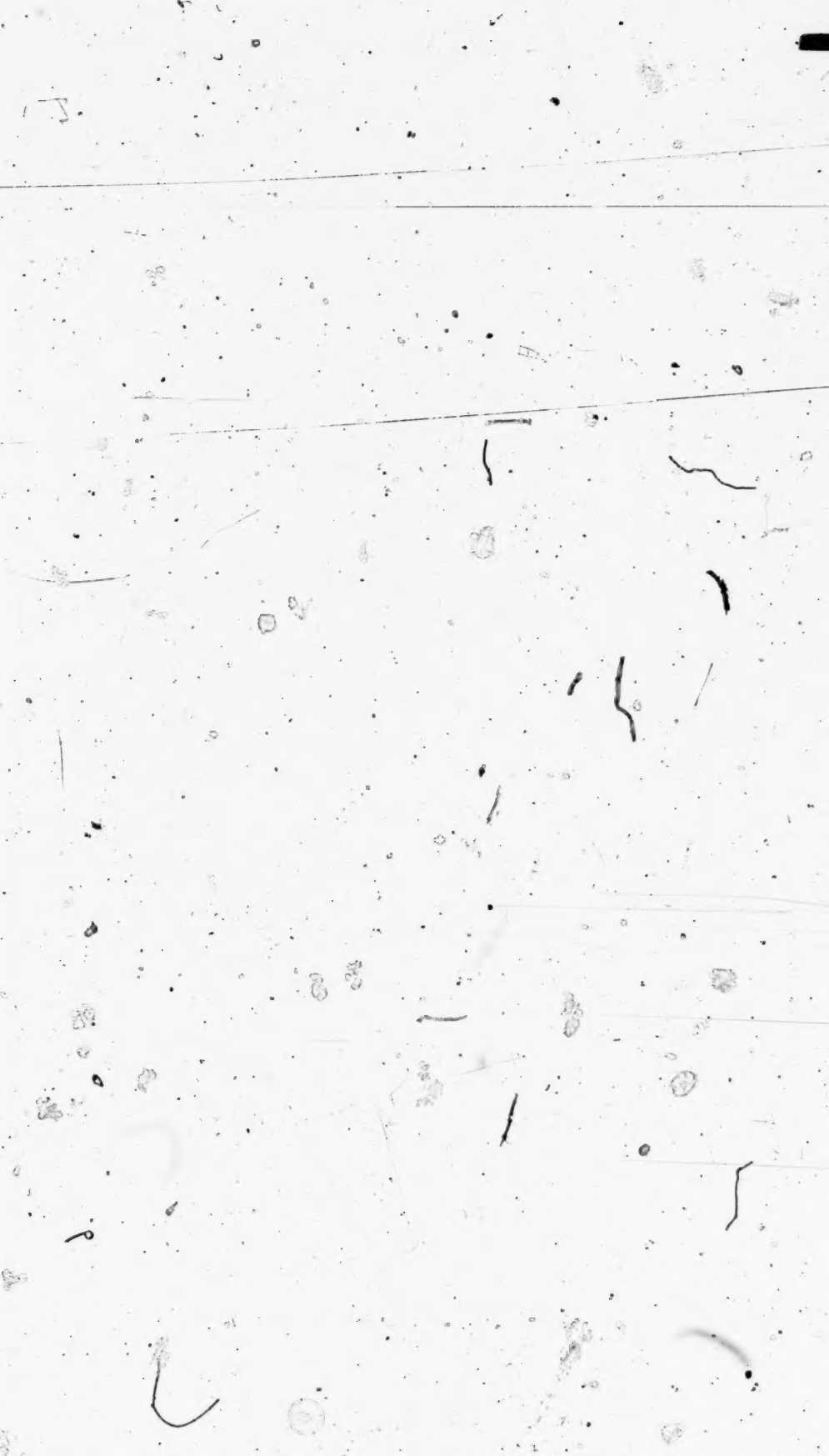

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 668

WILLIAM F. ESENWEIN,

Petitioner,

vs.

COMMONWEALTH EX REL. MAY H. ESENWEIN.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF PENNSYLVANIA.

To the Honorable, Harlan Fiske Stone, the Chief Justice, and the Associate Justices of the Supreme Court of the United States:

The petitioner, William F. Esenwein, by his counsel, respectfully prays for a writ of certiorari herein to review a certain final decision of the Supreme Court of the State of Pennsylvania, being the highest court of the said State, in the above entitled action, the opinion and decision of said Court having been rendered and filed January 3, 1944 (R. 62); by which said decision the said Court held that petitioner was not entitled, upon the basis of a divorce decree obtained by him in Clark County, Nevada, to a release from an order requiring him to support respondent as his wife.

Questions Involved.

Was petitioner deprived of a right guaranteed him by Article IV, Sec. 1 of the federal constitution by the action of the Supreme Court of Pennsylvania in the decision aforesaid, whereby his divorce decree, rendered by the Nevada Court and properly authenticated pursuant to the Act of Congress, was disregarded and held legally insufficient to sever in Pennsylvania the relationship of man and wife between petitioner and respondent, it being conceded that in Pennsylvania the duty to support ceases with the termination of the marriage relationship?

Statement of Case.

Petitioner and respondent were married in Pennsylvania and lived there prior to and after their separation in the year 1919 until the summer of 1941, when petitioner left Pennsylvania and removed to Nevada. He has not since returned to Pennsylvania. He is at present a resident of Ohio.

In 1922 respondent obtained a support order in the County Court of Allegheny County, Pennsylvania, with which, as modified from time to time, petitioner complied until shortly after December 8, 1942, when he presented his petition praying for a total release from said order, on the ground that he had been divorced from respondent by the Eighth Judicial District Court of Clark County, Nevada on September 8, 1941 and that, in view of the decision of the Supreme Court of the United States in *Williams* v. *North Carolina*, 317 U. S. 287, 63 S. Ct. 207, he was no longer required to concede that the rule of *Haddock* v. *Haddock*, 201 U. S. 562, applied to his situation as a defendant in the aforesaid support proceeding.

After hearing, his petition was refused (R. 48). Upon appeal to the Superior Court of Pennsylvania the order

of the County Court was affirmed July 16, 1943, 153 Super. 69, 33 A. 2d 675 (R. 56). Petitioner's Application for Allocatur was allowed by the Supreme Court of Pennsylvania by order, dated August 12, 1943 (R. 57). After argument, the order of the Superior Court was affirmed, Mr. Justice Linn writing the opinion for the majority of four justices and Mr. Justice Drew writing a dissenting opinion in which Chief Justice Maxey concurred (R. 59).

The opinions of the said courts are set forth in the record which accompanies this petition (R. 51, 59, 63).

At the original hearing in the said County Court petitioner rested his case for release from the support order substantially upon his divorce proceeding, properly authenticated. Respondent in opposition thereto relied upon what was shown in the exemplification, namely, that petitioner had taken up a residence in Las Vegas, Nevada in June, 1941 and that he had been divorced there by a decree dated Sept. 8, 1941. By reference to a deposition previously given by petitioner in another stage of the support proceedings, it was then shown by respondent that "some time" in October, 1941 petitioner was a resident of Cleveland, Ohio and had remained such to the time of trial (R. 42). Reference to the official Pennsylvania reports was also made to show that petitioner had twice been denied a divorce from the respondent in Pennsylvania, once in 1933 and again in 1940. Neither party testified in person.

Reasons for the Allowance of the Writ.

(1) It is respectfully suggested that the writ prayed for should be issued in order that, by affording petitioner the relief to which he is entitled under what his counsel deem to be the necessary consequence of the rule of law as announced in *Williams v. North Carolina, supra*, the marital status and resulting rights and obligations of innumerable

other parties, similarly situated, will be definitely settled by this Court as "the final arbiter" of the question whether a decision such as that here sought to be reviewed is "a permissible limitation on the full faith and credit clause". (317 U. S. 302).

(2) The Pennsylvania Supreme Court has decided a federal question of substance in a way not in accord with the applicable decisions of this Court. This question was raised and relied upon by petitioner in the courts below (R. 10, 34, 56). It was presented also to the Superior Court. (See Appendix to this petition.)

The Importance of the Question.

Clarification and extension of the rule of the *Williams* case appears to be necessary in the public interest. In support of the existence and urgency of such necessity, we refer not only to the division of opinion which existed among the six justices of the Supreme Court of Pennsylvania in the instant case, but also to a similar diversity of opinion in two other recent appellate court cases; *Stephens* v. *Stephens*, 181 App. Div. 49 N. E. 2d 560; and *In re Holmes Est.*, New York Court of Appeals, November 24, 1943, the latter case being a four to three decision with Chief Judge Lehman writing the opinion for the majority. More serious still is the circumstance that the aforesaid decisions of the highest courts of the States of New York and Pennsylvania are irreconcilable. The many law review articles which have appeared during the last year reflect a similar lack of uniformity of interpretation and add to, rather than lighten, the burden of bench and bar in attempting to apply the *Williams* case.

WHEREFORE petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of your Honorable Court directed to the Supreme Court of Penn-

sylvania, commanding that court to certify and send to your Honorable Court for review and determination on a day certain therein to be named, a full and complete transcript of the record of all proceedings in the case numbered and entered on its docket No. 5 March Term, 1944, entitled: Commonwealth Ex. Rel. May H. Esenwein v. William F. Esenwein, Appellant, and that the judgment of said court entered January 3, 1944 be reversed by your Honorable Court, and that your petitioner may have such other and further relief in the premises as to your Honorable court may seem meet and just.

Respectfully submitted,

SIDNEY J. WATTS,
Attorney for Petitioner.

FRED. C. HOUSTON,
Of Counsel.

APPENDIX TO PETITION FOR CERTIORARI.

(Questions Presented to Superior Court of Pennsylvania.)

STATEMENT OF QUESTIONS INVOLVED.

1. Did the action of the Supreme Court of the United States on December 21, 1942 in overruling *Haddock vs. Haddock* constitute such a change in the conditions and circumstances of the parties to this litigation, occurring after the entry by the Court below of an order of support (the legality of which was dependent upon the rule of *Haddock vs. Haddock*), as to entitle appellant-husband to a revocation of said order, when the application for said revocation was made, and this appeal from the refusal thereof was taken, within the time allowed for an appeal from the original order of support? *Negatived.*

2. Was the Court below obliged to accord full faith and credit to the decree in divorce rendered by the Nevada court, of which a duly certified exemplification was tendered to the Court below, in the absence of any proof which challenged the jurisdiction of said court to enter said decree? *Negatived.*

3. Was the Court below warranted in refusing to accord full faith and credit to the decree of the Nevada court for the single reason assigned by the Court below, namely, that the Pennsylvania courts had previously refused appellant-husband a divorce? *Affirmed.*

BRIEF IN SUPPORT OF PETITION.

Opinions of the Courts Below.

The opinion of Judge Gunther of the County Court of Allegheny County, Pennsylvania appears at page 49a of the Record as tendered to the Supreme Court of Pennsylvania. The opinion of Judge Kenworthey of the Superior Court is reported in 153 Pa. Super. 69, 33 A. 2d 675. The majority and minority opinions of the Pennsylvania Supreme Court are not yet reported. The aforesaid appellate court opinions are printed in the record filed in this Court.

Jurisdiction.

The jurisdiction to issue the writ is found in 28 U. S. C. A. 344(b), Jud. Code §237(b), as amended.

Argument.

We believe that the dissenting opinion in the instant case and the majority opinion of Chief Judge Lehman in the *Holmes* case set forth adequate reasons for the allowance of the writ. Accordingly we do not burden this Brief with a recital of the authorities and contentions upon which we relied in the Pennsylvania courts.

Our view is that as the result of the *Williams* case *Bell* v. *Bell*, 181 U. S. 175, *Streitwolf* v. *Streitwolf*, 181 U. S. 179 and *Andrews* v. *Andrews*, 188 U. S. 14 are definitely shattered as present day authorities. However, even if they are still authorities, they do not support the decision which we here seek to have reviewed.

We are definitely taken aback by the manner in which alleged statements by counsel arguendo are attempted to be relied on in this case by both the Superior and the Supreme Courts of Pennsylvania to supplement the fact picture de-

veloped at the trial in the County Court. Such oral statements were not reported or reduced to writing. We assume, without admitting, that we are bound here by this unusual procedure. Even so, that a domicile of choice cannot be acquired by residence in a hotel is, in our opinion, an unsupportable contention. That a domicile so acquired may not be terminated at any time, i. e., immediately upon the happening of the reasons occasioning the decision, is equally unsupportable. But in any event, such speculations or assumptions, not supported by anything in the printed record, are no solid ground or reason for striking down the decree of a court of a sister state entered in what was admittedly "a judicial proceeding". It is important, perhaps, that the majority opinion of the Supreme Court of Pennsylvania makes no reference to other matters of far greater significance which were developed at the oral argument in that court, which related to the finality of the manner of petitioner's removal from Pennsylvania and to his subsequent remarriage upon the faith of his Nevada divorce.

The evidence before the Nevada court was properly put in evidence as an essential part of the "judicial proceedings", which by the constitutional provision were entitled to full faith and credit. What right had the Pennsylvania Supreme Court to assume that the Nevada court would have opened and set aside its decree upon a showing of everything referred to and relied upon in the majority opinion, including such evidence, if the respondent had applied to that court for the entry of such an order and upon such grounds, or that this Court would have convicted the Nevada court of error for not doing so? And unless such matters were sufficient in the Nevada court to invalidate the decree, then the decree, being valid there, is valid in every other state. If the actual result in the *Williams* case does not require that conclusion, we are unable to appraise its value as a precedent. If the decision in the instant

case is allowed to stand and to furnish a precedent in countless similar cases, it seems to us that the *Williams* case is reduced to a mere quixotic jousting with the windmill of *Haddock v. Haddock*, and that, in spite of the reversal of their convictions, the Williams and Hendrix spouses are not only still subject to the charges of bigamy, but that they have no reliable defenses to those charges. Our latest information is that after a retrial in the Superior Court of Caldwell County, North Carolina they have been sentenced to the State Penitentiary and have given notice of appeal to the State Supreme Court.

Conclusion.

In fairness to petitioner and to suitors, counsel and judges in all the forty-eight states of the Union, the questions raised by this application should be set at rest by this Court.

Respectfully submitted,

SIDNEY J. WATTS,
Attorney for Petitioner.

FRED C. HOUSTON,
Of Counsel.

(122)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1943

NO. [redacted] 20

WILLIAM F. ESENWEIN, Petitioner,

v.

COMMONWEALTH ex rel. MAY H. ESENWEIN.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Pennsylvania.

BRIEF FOR THE RESPONDENT IN OPPOSITION.

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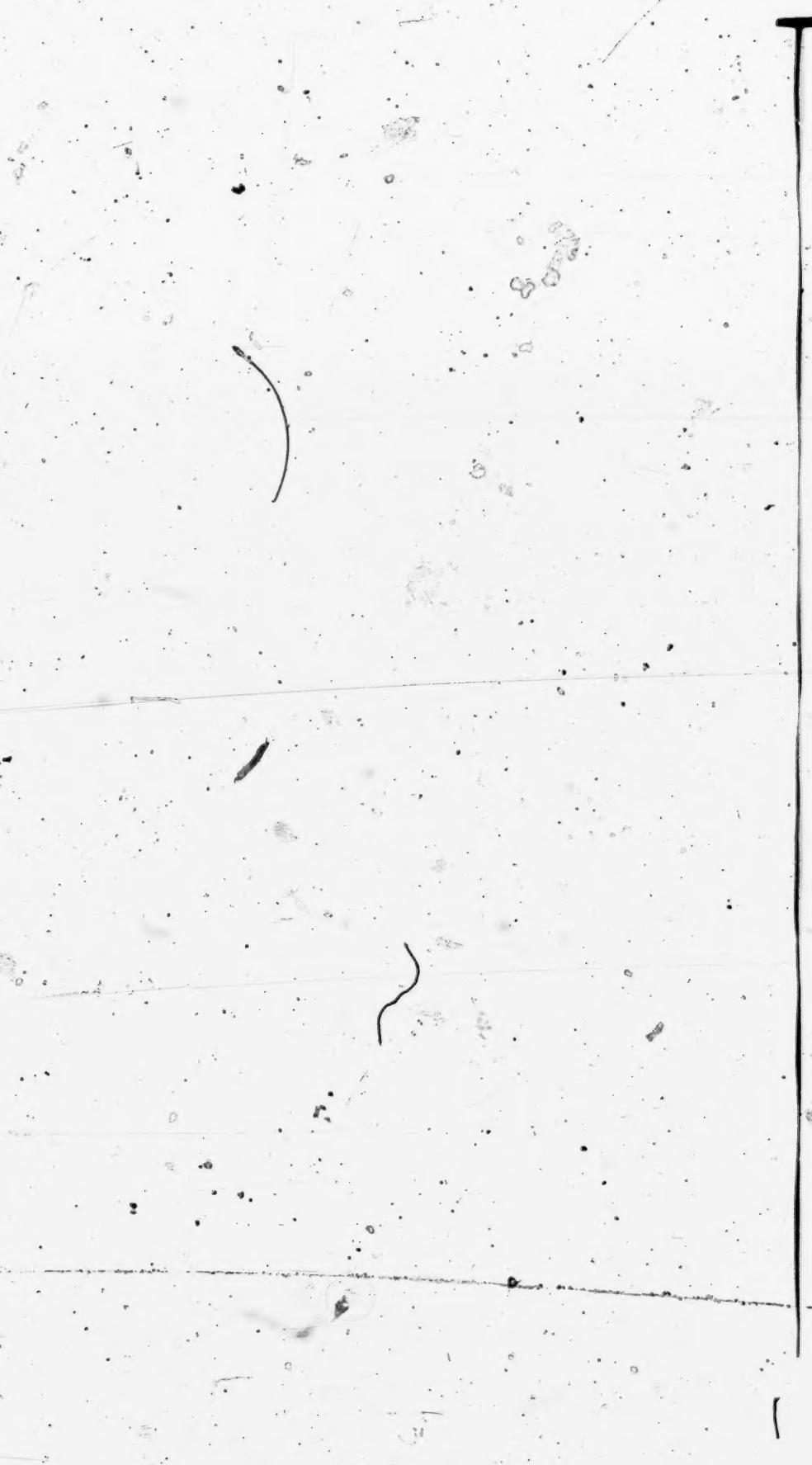

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1943

NO. 668.

WILLIAM F. ESENWEIN, Petitioner,

v.

COMMONWEALTH ex rel. MAY H. ESENWEIN.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Pennsylvania.

BRIEF FOR THE RESPONDENT IN OPPOSITION.

OPINIONS IN COURT BELOW.

The Opinion of Judge Gunther of the County Court of Allegheny County, Pennsylvania appears on page 49, Transcript of Record filed by Petitioner in this Court. The Opinion of Judge Kenworthey (R. 51) of the Superior Court of Pennsylvania, is reported in Vol. 153 Pa. Super. Crt. 69; 33 A. 2nd 675. The majority (R. 59) and the minority (R. 63) Opinions of the Supreme Court of Pennsylvania are reported, 349 Pa. 451 (1944); 35 A. 2d 335.

JURISDICTION.

The judgment sought to be reviewed was entered January 3rd, 1944 (R. 59; 62). The petition for certiorari was filed in this Court on February 3rd, 1944. The jurisdiction of this Court is invoked under 28 U.S.C.A. §344(b), Judicial Code §237(b), as amended.

QUESTIONS PRESENTED.

1. Whether petitioner was deprived of any rights under Article IV, Section 1, of the Federal Constitution.

2. Whether the Decision in the case of Williams v. North Carolina, 317 U.S. 287; 63 S. Ct. 207, in overruling Haddock v. Haddock, 201 U.S. 562, laid down any new rule of law prohibiting an inquiry by the Court of the matrimonial domicile, into the jurisdiction of the foreign Court (Nevada) which rendered a decree in divorce.

3. Whether the Decision in the case of Williams v. North Carolina, (supra), in overruling Haddock v. Haddock (supra), has any relevancy to the case at bar.

STATEMENT.

Petitioner and respondent were married November 22nd, 1899 in Pennsylvania. In November, 1919, Petitioner left his wife and has not lived with her at any time thereafter. After Petitioner's two unsuccessful attempts to obtain a divorce in Pennsylvania,—(reported and referred to in Vol. 141 Pa. Super Crt. 604—, Petitioner then went to Las Vegas, Nevada in June 1941 (R. 43), and after the precise minimum of residence there required of six weeks, filed an action in divorce against Respondent (R. 11). Proof of Service upon Respondent at Pittsburgh, Pennsylvania, the matrimonial domicile, appears, (R. 16). The Nevada proceedings in full, appear in the Record, (R. 11 to R. 26 inclusive). The wife did not appear. A decree in divorce was granted in Nevada September 8th, 1941, (R. 18).

In 1922 Respondent obtained a support order in the County Court of Allegheny County, Pennsylvania (R. 1), which was modified from time to time until the final order of December 8th, 1942, (R. 9). A Petition for Revocation of the Order of Support was filed in said County Court on February 1st, 1943, (R. 10). The Answer to said Petition appears (R. 27), averring (inter alia), fraud.

After hearing, this Petition for Revocation was refused, (R. 48). On appeal by petitioner to the Superior Court of Pennsylvania, the Order of the County Court was affirmed, (R. 56), on July 16th, 1943; 153 Pa. Super. Crt. 69; 33 A. 2nd 675, Opinion by Judge KENWORTHEY, (R. 51). On appeal to the Supreme Court of Pennsylvania, allowed (R. 57), the order of the Superior Court

was affirmed (R. 62); Opinion by Justice LINN, filed January 3rd, 1944, (R. 59). A dissenting Opinion by Justice DREW, joined by Mr. Chief Justice Maxey was filed January 3rd, 1944, (R. 63).

At the original hearing in County Court, Respondent in support of her averment of fraud, read into the record, for comparison, a portion of the Nevada testimony by Petitioner given September 8th, 1941, as to his alleged intention to make Clark County, Nevada, his "permanent place of residence," (R. 43); and Respondent also read into the record testimony from a deposition previously given by Petitioner in a prior proceeding related to the matter of support, showing that Petitioner did not in fact make Clark County, Nevada, his "permanent place of residence," (R. 42), but was a resident of Cleveland, Ohio since some time in October, 1941 (R. 42). The date is fixed by Petitioner himself as "on or about October 18th, 1941." (R. 6, par 7th). Petitioner's counsel, in reply to a specific question by President Judge KELLER in the Superior Court at time of argument, stated that it could be assumed that "he (Petitioner) left Nevada immediately after obtaining his divorce," (R. 55). Respondent contended that the *animus manendi* was lacking and that therefore Nevada had no jurisdiction for want of bona fide domicile. Both the appellate Courts so found, (R. 55; R. 61).

ARGUMENT.

I. Article IV, Section 1.

The Petitioner was deprived of no right under Article IV, Section 1, of the Federal Constitution. This provision does not, and did not in the instant case, prevent inquiry into the jurisdiction of the Nevada Court:

> "*Neither the constitutional provision* that full faith and credit shall be given in each State to the public acts, records and judicial proceedings of every other State,—(nor the Act of Congress passed in pursuance thereof), *prevents an inquiry* into the jurisdiction of the Court by which a judgment offered in evidence was rendered." (Italics ours).

Thompson v. Whitman, 18 Wallace, 457; 462, 463 (1873);
Bell v. Bell, 181 U.S. 175; 21 S. Ct. 551 (1901);
Andrews v. Andrews, 188 U.S. 14; 23 S. Ct. 237 (1903).

The right of the Petitioner to claim the benefit of the full faith and credit clause (Art. IV, Sec. 1) for the Nevada decree in Pennsylvania, hinged directly upon whether or not (notwithstanding said constitutional provision), the jurisdiction of the Nevada Court could still be challenged by inquiry as to whether or not bona fide domicile in Nevada existed.

Said jurisdiction could be so challenged; *Thompson v. Whitman, supra.* As Justice LINN has said, "There is no doubt of the power of the Courts below to inquire into the jurisdictional facts necessary to confer jurisdiction on the Nevada Court; *Bell v. Bell*, 181 U.S. 175;

Streitwolf v. Streitwolf, 181 U.S. 179; *Andrews v. Andrews*, 188 U.S. 14", etc., (R. 60).

If, based on the *fact* of *lack* of the *animus manendi*, —the lack of real, honest intention to establish a bona fide domicile in Nevada, we come to the conclusion of law (*Dorrance's Estate*, 309 Pa. 151 at page 156; 163 At. p. 304) that Nevada had no jurisdiction, then it follows as a legal conclusion that the Nevada decree "is entitled to NO FAITH and CREDIT" in Pennsylvania. For, where, for instance, the husband was NOT a bona fide resident of Pennsylvania, it was held that:

> "A decree of divorce obtained in the State of Pennsylvania in which neither party is domiciled, upon service by publication, and *in another state*, is *entitled to no faith and credit in that state*." (Italics ours)
>
> *Bell v. Bell*, 181 U. S. 175; 21 S. Ct. 551 (1901); *Andrews v. Andrews*, 188 U. S. 14; 23 S. Ct. 237 (1903).

Judging Petitioner by his *acts* and conduct as against his mere words (*Dorrance's Estate*, 309 Pa. 151; 156, 165, 167, 170; 163 A. 303; *Graham v. Dempsey*, 169 Pa. 460, 462; *Clayton v. Lienhard*, 312 Pa. p. 436; *Holt v. Hendee*, 248 Ill. 288, 296; *Dalrymple's Estate*, 215 Pa. 367, p. 371 (quoting Jacobs on Domicile), he, Petitioner, did *not* have the *animus manendi* required as a vital element; he did *not* intend to establish a bona fide domicile in Nevada.

"He did not establish a bona fide domicile," (Judge KENWORTHEY, R. 55). "He had no intention of making his domicile in Nevada," (Justice LINN, R. 61). There

existed no scientific device for looking into Petitioner's mind and thought processes to ascertain his real intention as he testified in Nevada on September 8th, 1941. We are therefore compelled to judge a person's real intentions by his acts rather than by mere words, *Dorrance's Estate*, 309 Pa. 151; 163 A. 303; there is no other way, (R. 55, Mid.). The rule in *Dorrance's Estate, supra*, is realistic, and saves us from being victimized by any pattern of legal, formal ritualism, (R. 43) where subsequent conduct belies the sincerity of words spoken even under oath, (R. 42; R. 22).

The State of Pennsylvania has established her own test of domicile in *Dorrance's Estate*, 309 Pa. 151; 163 At. 303; and she has lawfully applied her own rule as enunciated in said *Dorrance's Estate, supra*, (R. 55, mid, page). The State of Pennsylvania has the "supreme power to interpret and declare the written and unwritten laws of the State"; *Brinkerhoff-Faris Co. v. Hill*, 281 U.S. 673, p. 680; 50 S. Ct. 451. The State of Pennsylvania's Courts have found as a fact on the record testimony (R. 42, 43) that petitioner did not intend to, nor did he establish, a bona fide domicile in Nevada, (R. 55; R. 61). This finding of fact was exclusively in the Pennsylvania Courts; * * * "its interpretation was in the Illinois Courts and not here; *Drivers Union v. Meadowmoor Co.*, 312 U.S. 287, p. 294; 61 S. Ct. 552.

If Petitioner's sudden change of mind from the moment he testified in Nevada on September 8th, 1941 (R. 22; 43) had been compelled by some legitimate reason, by some unforeseen circumstances, he should have appeared and given such testimony, (if any he had), in the County Court below, as was so sharply pointed out by

Justice LINN, (R. 61). Prof. Lorenzon points out the identical observation, in principle, in his able analysis of *Haddock v. Haddock* and *Williams v. North Carolina, supra,* Vol. 52 Yale Law Journal, at page 353. In the same publication and page, Prof. Lorenzon comments:—

> "If it appears from the facts that the petitioner *left the State shortly after the decree of divorce* was granted, a presumption might well be created that no bona fide intention to establish a permanent home existed". (Italics ours)

Petitioner cannot *escape* the lack of Nevada jurisdiction by hiding behind the full faith and credit clause (Art. IV, Sec. 1). He cannot be heard to protest against the exposure of his own fraud and *mala fides*—(called, "a sham and fraud" by Justice LINN, R. 61)—and at the same time demand protection under the full faith and credit provision, (Art. IV, Sec. 1). This insistence by Petitioner on Article IV, Section 1, is simply another way of insisting that the *mere existence* of that Constitutional provision, *ipso facto*, and automatically *bars inquiry* into the question of the Nevada Court's jurisdiction in this case.

This position is unsound; *Thompson v. Whitman*, 18 Wallace 457; 462, 463. (1873)

Article IV, Section 1, *supra*, was not intended as a refuge for those who practice *mala fides* and fraud upon the laws of the State of their domicile,—(here Pennsylvania). The case of *Andrews v. Andrews*, 188 U.S. 14 (1902), held that the Courts of Massachusetts were,—

> • • • "not obliged to enforce a decree in divorce, obtained in another state, as to persons domiciled in

Massachusetts and who go into such other State *with the purpose of practising a fraud* upon the laws of the State of their domicile, that is, to *procure a divorce without obtaining a bona fide domicile in such other State*". (Italics ours)

The lack of the *animus manendi* was fatal to Navada jurisdiction. It followed as a conclusion of law, based upon undisputed facts; *Dorrance's Estate*, 309 Pa. 151 at page 156; 163 At. at p. 304;—(R. 42-43; R. 55 nr. top); *Halpine v. Halpine*, 52 Pa. Super. Crt. 80, p. 86; *Dulin v. Dulin*, 33 Pa. Super Crt. 4, p. 5; *Harrison v. Harrison*, 69 Pa. Super. Crt. p. 582.

There being no *animus manendi*, and thus, no jurisdiction in the Nevada Court, there arises no question of any extension of the full faith and credit clause to the decree rendered under such circumstances. The Nevada decree (R. 18) was entitled to no faith and credit in Pennsylvania; *Bell v. Bell*, 181 U.S. 175; 21 S. Ct. 551. There is therefore no Federal question or questions involving the application or construction of Article IV, Section 1, or of any other provision of the Constitution of the United States.

II. The Decision in Williams v. North Carolina, 317 U.S. 287; 63 S. Ct. 207.

On page 3 (bottom), and on page 7 of his Petition for Writ of Certiorari, the Petitioner speaks of a new rule of law "as announced in Williams v. North Carolina", and claims that this new rule has "definitely shattered" *Bell v. Bell*, 181 U.S. 175, *Streitwolf v. Streitwolf*, 181 U.S. 179 and *Andrews v. Andrews*, 188 U.S. 14 "as

present day authorities". There is no reasoning or argument for this proposition whatever.

Petitioner, in the Courts below, has never been specific, has never defined the alleged new rule supposed to have been established by the Decision in Williams v. North Carolina, but has implied, without undertaking to so state, that the Decision in said case of *Williams v. North Carolina*, in overruling *Haddock v. Haddock*, (201 U.S. 562), has laid down a new rule of law *prohibiting an inquiry* by the Court of the matrimonial domicile, into the jurisdiction of the foreign Court (Nevada), which renders a decree in divorce. This was Petitioner's position in the appellate Courts below.

Respondent contradicted this position and pointed out that in the case of Williams v. North Carolina, *supra*, the *fact* of bona fide domicile *was admitted* by the State of North Carolina; and it was *not* found either as a fact or as a matter of law, by the Supreme Court of the United States: *Williams v. North Carolina*, 317 U.S. 287; page 302, cited verbatim by Justice LINN, (R. 62), especially, where his Honor Mr. Justice Douglas says:—

> "Nor do we reach here the question as to the power of North Carolina to refuse full faith and credit to Nevada divorce decrees because, contrary to the findings of the Nevada Court, North Carolina finds that no *bona fide* domicile was acquired in Nevada".

The question of bona fide domicile of libellants in the Williams case did not arise, and was not considered nor decided in Mr. Justice Douglas's Opinion of the majority; Prof. Lorenzon in 52 Yale Law Journal, at page 344 (March, 1943)—"The issue of domicile was not before the Court"; *Estate of Bingham*, 265 N.Y. State App. Div. 463, p. 466; *Matter of Holmes*, 291 N.Y., pg. 284;—

"The Williams case is not controlling * * * the majority opinion rested upon the admission of the North Carolina Attorney-General that 'there probably is enough evidence in the record to require that petitioners be considered to have been actually domiciled in Nevada' "; to the same effect, Mr. Justice DOUGLAS in the majority Opinion, *Williams v. North Carolina*, 317 U.S. at page 291: "Moreover it (North Carolina) admits that there is probably enough evidence in the record that petitioners be considered 'to have been actually domiciled in Nevada' ".

Overruling Haddock v. Haddock (supra), thus holding substituted service good in North Carolina, cannot affect the case at bar. Such service was predicated upon an admitted bona fide domicile in Nevada (in the Williams case). Jurisdiction was *admitted* in the Williams case. It is precisely the Nevada jurisdiction which is lacking in the case at bar, and which is attacked and certainly not admitted. The jurisdiction is the first consideration,—the service must rest on that foundation. Without jurisdiction to begin with, we never arrive at any question of service,—we never get that far. Whether Haddock v. Haddock was or was not overruled in the Williams case has no relevancy under the facts in the present case,—it is immaterial because of the initial failure of the Nevada jurisdiction in the case at bar.

Williams v. North Carolina granted no immunity against the firmly established legal right to challenge the jurisdiction of the foreign (Nevada) Court. There still remains the freedom to inquire into the jurisdiction *same as before the Decision in the Williams case.* "He (Mr. Justice DOUGLAS) painstakingly pointed out that the Court was not overruling Bell v. Bell", (Judge KENWORTHEY, R. 53, nr. top). The statement of Petitioner

on page 7 of his Petition for Certiorari, that the Williams case has "definitely shattered" Bell v. Bell, is a mere naked and unsupported allegation, and is in error.

Bona fide domicile is a jurisdictional fact; its existence is subject to challenge. *The Decision in Williams v. North Carolina has not changed this rule.* Only if a plaintiff in divorce actually acquires a bona fide domicile in the State granting the decree, is that decree entitled to full faith and credit; the authority of Bell v. Bell has not been impaired, (R. 52); (R. 53).

The "division of opinion which existed among the six Justices of the Supreme Court of Pennsylvania" (cited page 4, Petition for Certiorari), did not arise by virtue of the Decision in the case of Williams v. North Carolina, *supra,* nor of anything thereto related, but arose solely on the *factual* question of the *intention* of the Petitioner to establish a bona fide domicile in Nevada, or, as the testimony puts it, "of making Clark County, Nevada your permanent place of residence", (R. 43). Applying the rule in the Pennsylvania case of *Dorrance's Estate*, 309 Pa. 151, 156; 163 A. 303, p. 304, to the admitted and undisputed facts, *i.e.*, to the conduct of Petitioner in departing from Nevada, to which he has not to date returned, promptly on obtaining his Nevada decree, the appellate Courts below concluded, as a matter of law, that the *animus manendi* was lacking; and that Petitioner "had no intention of making his domicile in Nevada", (R. 61).

> "The determination of decedent's domicile in this appeal is a conclusion of law based upon facts, most of which are undisputed".
>
> *Dorrance's Estate*, 309 Pa. at page 156; 163 A. p. 304; (R. 55, mid.).

No Federal or Constitutional question was involved, nor any difference of interpretation of Williams v. North Carolina in said division of opinion.

As to the case of *Holmes Estate*, 291 N.Y. 261; 59 N.E. 2d 424, cited on page 4, Petition for Certiorari, (R. 67), the facts are not analogous. The majority opinion in that case omits the crucial element in the Williams v. North Carolina case, to-wit, the *admission* by North Carolina of domicile of libellants in Nevada, which vital point is referred to in the minority opinion *in five (5) distinct quotes* from the Opinion of Mr. Justice DOUGLAS, set forth in said *Holmes Estate*, 291 N.Y. at pages 281, 282.

The Nevada jurisdiction, which was *admitted* in the Williams case, was not merely "assumed" as stated in the majority opinion in *Holmes Estate*, 291 N.Y. at page 268. In Holmes Estate, *supra*, there was no challenge, in the Agreed Statement of Facts (R. 68) to the domicile of libellant in Nevada; contra, in the Esenwein case at bar, the Nevada jurisdiction *is* challenged, (R. 42-43; R. 55 nr. top).

The grounds of the dissenting opinion (In Re Holmes Estate, supra), relate in no way to the Decision in Williams v. North Carolina, but solely to the item of *fact*, that the *Agreed Statement of Facts* in that case *"nowhere * * * claimed * * * that he was * * * domiciled in Nevada"*. "We stress this because *it goes to the foundation of our disagreement*," *Matter of Holmes*, 291 N.Y. 261, at p. 279.

As to the objection stated in the minority Opinion at bar (R. 69), that "appellee has failed to adduce any

affirmative proof", etc., we respectfully wish to observe that jurisdiction is always open to collateral attack and may be based solely upon the face of the proceedings of the foreign Court, *without resorting to extrinsic proof, i.e.*, from an inspection of the record itself, (R. 42-43; *Dorrance's Estate*, 309 Pa. 151, 156; 163 At. p. 304).

O'Donoghue v. Boies, 159 N.Y. p. 99; 53 N.E. 537;

Matter of Holmes, 291 N.Y. at p. 287.

In the case of *Stephens v. Stephens*, Ill. App. Div. 49 N.E. 2d 560, (cited page 4, Petition for Certiorari), the question of *bona fide residence in Nevada* came up on appeal. The majority opinion did not consider this issue. The minority opinion did, and it held—(as Mr. Justice DOUGLAS held)—that *Williams v. North Carolina*, 317 U.S. 287; 63 S. Ct. 207, does not overrule Bell v. Bell.—(R. 53, *idem*).

Conclusion.

1. Petitioner having acquired no bona fide domicile in Nevada, the Nevada decree is entitled to no faith or credit in Pennsylvania, under Art. IV, Section 1, of the Federal Constitution. Petitioner has therefore been deprived of no rights under said Federal provision.

2. The Opinion of Mr. Justice DOUGLAS in Williams v. North Carolina, supra, is clear and definite (see R. 62, quote by Justice LINN), and needs no further re-consideration, amplification, interpretation, re-statement or reiteration by this Court, either on the instant Petition for Certiorari or otherwise.

3. The judgment of the Court below is not inconsistent with the Decision in Williams v. North Carolina;

"Our conclusion is not inconsistent with the decision in *Williams v. North Carolina*, 317 U.S. 287." (R. 62, Justice LINN).

4. The Decision in the case of Williams v. North Carolina, in overruling Haddock v. Haddock, has no relevancy to the facts in the case at bar.

Respectfully submitted,

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Supreme Court of the United States

October Term, 1944.

No. 20.

WILLIAM E. ESENWEIN,

Petitioner,

vs.

COMMONWEALTH OF PENNSYLVANIA, *Ex Rel.* MAY H. ESENWEIN.

BRIEF FOR PETITIONER, WILLIAM F. ESENWEIN.

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BRIEF FOR PETITIONER, WILLIAM F. ESENWEIN.

Official Report of Opinions Below.

The opinion of the Supreme Court of Pennsylvania is reported in 348 Pa. 455, 35 A. 2d 335 (R. 59). The opinion of the Superior Court of Pennsylvania, which was affirmed by the Supreme Court, is reported in 153 Pa. Super. 69, 33 A. 2d 675 (R. 51).

Jurisdiction.

The jurisdiction arises from the granting of the writ of certiorari herein pursuant to Section 237(b) of the Judicial Code, as amended, 28 U. S. C. A. § 344(b).

Concise Statement.

Petitioner and respondent were married in Pennsylvania and lived there prior to and after their separation in the year 1919 until the summer of 1941, when petitioner left Pennsylvania and removed to Nevada. He has not since returned to Pennsylvania. In the latter part of October, 1941 he left Nevada and removed to Cleveland, Ohio, where he has since resided.

In 1922 relator wife filed an information (R. 32) in the County Court of Allegheny County, Pennsylvania, praying for the issuance of a warrant for petitioner's arrest for alleged non-support. She obtained a support order with which, as modified from time to time, petitioner complied until shortly after December 8, 1942, when he presented his petition praying for a total release from a modified order, entered December 8, 1942. Petitioner based his said application for relief upon the ground that he had been divorced from respondent by the Eighth Judicial District Court of Clark County, Nevada on September 8, 1941, and that, in view of the decision of the Supreme Court of the United States in *Williams v. North Carolina*, 317 U. S. 287, 63 S. Ct. 207, he was no longer required to concede that under the rule of *Haddock v. Haddock*, 201 U. S. 562, his marriage to respondent remained undissolved in Pennsylvania.

The modified order of December 8, 1942 (R. 9) was the first and only order of support entered by the said County Court after petitioner's Nevada divorce. Said order had been entered on his petition praying for a remission of arrearages and for a reduction of the monthly rate of support. This procedure on petitioner's part, instituted after his Nevada divorce but prior to the decision of this Court in the *Williams* case, was in accordance with the then prevailing state of the law governing his marital situation, as

fixed by *Haddock v. Haddock*, 201 U. S. 562. Petitioner's prayer for relief had been granted in part by said order of December 8, 1942, to the extent that the arrearages were reduced to the sum of $1,000.00 and the monthly rate was reduced to $75.00. The payment of the said sum of $1,000.00 had been promptly made by petitioner (R. 33).

Thereafter and within a few weeks following the entry by this Court of its decision in *Williams v. North Carolina*, 317 U. S. 287 petitioner applied, as above set forth, to the said County Court for an entire vacation or revocation of the said amended support order of December 8, 1942. His application was refused and petitioner thereupon lodged three separate appeals, one from said order itself and two from orders refusing to open and to vacate the same. These appeals were docketed in the Superior Court of Pennsylvania on March 5, 1943 and became fully effective within the prescribed statutory period of three months after December 8, 1942. Judgments of affirmance were entered by the Superior Court (R. 51, 56). (See docket entries, R. 5.).

Appeals to the Supreme Court of Pennsylvania were specially allowed and taken from each one of the orders of affirmance as entered by the Superior Court. Stipulations were filed in two of the three cases in the Supreme Court providing for the entry therein of orders similar to that which should finally be entered in the one case which was then proceeded with in the Supreme Court (No. 5 March Term, 1944, R. 59).

At the original hearing in the said County Court petitioner rested his case for release from the support order substantially upon his divorce proceeding, properly authenticated (R. 34). Compliance was shown with the provisions of the Nevada law relating to substituted service (R. 35, 36). The court was also referred to the statutory

provision permitting the granting of an absolute divorce upon the ground of a living apart for three consecutive years without cohabitation (R. 36). This was the ground relied upon by petitioner. It is not a ground for divorce in Pennsylvania.

Relator wife in opposition to petitioner's case relied upon what was shown in the exemplification, namely, that petitioner had taken up a residence in Las Vegas, Nevada in June, 1941 and that he had been divorced there by a decree dated September 8, 1941. By reference to a deposition made by petitioner in support of his said application for remission of arrearages and other relief, it was then shown by relator that "some time" in October, 1941 petitioner was a resident of Cleveland, Ohio and had remained such to the time of trial (R. 42). Reference to the official Pennsylvania reports was also made to show that petitioner had twice been denied a divorce from the respondent in Pennsylvania, once in 1933 and again in 1940. Neither party testified in person.

The defence relied upon by the relator wife in the County Court was *res judicata* (R. 28, 48); that the Nevada court was bound by the previous refusals on two separate occasions of the Pennsylvania courts to dissolve the marriage relation. The County Court judge based his dismissal of the petition upon that single ground (R. 49). Counsel for petitioner had submitted petitioner's case to the County Court on the assumption that the issue of acquisition by petitioner of a domicil in Nevada had not been raised by relator and that the decree of the Nevada court was therefore presumptively valid, and would, for the purposes of this case, remain so until challenged by relator with proof sufficient to show lack of jurisdiction in the Nevada court.

When the case was heard on appeal in the Superior Court the judges of that court injected of their own motion the issue of acquisition of domicil over our protest that the issue had not been raised by the pleadings and had not been heard or passed upon by the trial court. Statements of counsel alleged to have been made during the oral argument in the Superior Court were seized upon and used by the opinion writer as evidence without previous notice to counsel of an intention on the part of the members of the court to proceed in that manner. In view, however, of the disposition of the judges, as manifested at the oral argument, to uphold the orders appealed from on the ground of lack of jurisdiction in the Nevada court, counsel for petitioner filed a supplemental brief on that point, in which it was contended that it could be fairly inferred that respondent's failure to challenge the Nevada's court finding in favor of jurisdiction was due to her inability to introduce any evidence militating against the finality of petitioner's removal from Pennsylvania and the *bona fides* of his claim of acquisition of domicil in Nevada, and that the promptness of his application for a divorce in the Nevada court, the shortness of time elapsed in the procuring of a decree and his early removal from Nevada to Ohio (after his remarriage) were not circumstances sufficient, in and of themselves, to warrant an assumption that a showing of such matters to the Nevada court would have resulted in a vacation by that court of its decree on the ground of lack of jurisdiction. If valid there, we contended that recognition of the decree by the Pennsylvania courts was commanded by the constitutional provision of full faith and credit.

The judges of the Superior Court were unanimous in rendering the decision of that court. Upon appeal, the jus-

tices of the Supreme Court divided, four for affirmance and two for reversal and for the granting of the relief originally prayed for, namely, vacation of the support order. As the dissenting opinion points out, all amounts of support money due up to, and, in fact, for some time beyond, the date of petitioner's Nevada divorce had been paid by petitioner.

In all the Pennsylvania courts it was admitted throughout that under the law of Pennsylvania the duty of a husband to pay support ceases with the severance of the marriage relation.

Neither the Superior Court nor the Supreme Court intimated that the affirmances were based on a theory of power in the Pennsylvania courts to enforce a condition of limited severance of the marital status; that is, to treat the foreign divorce as valid elsewhere than in Pennsylvania, as had been sanctioned by the result in *Haddock v. Haddock*. However, in subsequent opinions in similar cases the Superior Court has indicated that that was what the court intended to hold in the instant case. *Com. v. Phelps*, 154 Pa. Super. 270, 35 A. 2d 530; *Melnick v. Melnick*, 154 Super. 481, 36 A. 2d 235.

Specification of Errors.

1. The Courts below erred in failing to give full faith and credit to the decree of divorce obtained by petitioner in a court of record of the State of Nevada, which said decree, properly certified, petitioner had tendered as the basis of his claim for relief from a support order, entered by the Pennsylvania court in a desertion and non-support proceeding, commenced by the wife prior to the date of said Nevada divorce decree.

2. The Courts below erred in disregarding petitioner's Nevada divorce decree (on the ground of lack of jurisdiction in the Nevada court), in the absence of any competent evidence impeaching the finding of the Nevada court in favor of jurisdiction, or rebutting the presumption of validity to the benefit of which petitioner was entitled.

3. The Supreme Court of Pennsylvania erred in reciting in its opinion that the issue which was tried in the County Court and there found in favor of the wife was that the proceedings in Nevada were conceived and executed in fraud upon the states and courts of Nevada and Pennsylvania, whereas the only real issue or defence raised by the wife in the County Court was that of *res judicata* (R. 28, 50).

4. The Supreme Court of Pennsylvania erred in the conclusion set forth in its opinion to the effect that the Superior Court was justified in making "the natural or normal inference" that petitioner's proceeding in Nevada was a sham and fraud *for the purpose of evading the support order of the County Court* (R. 61), whereas the record showed that petitioner had fully complied with the support order and had made no attempt whatever to obtain relief therefrom until after the decision of this Court on December 21, 1942 in the *Williams* case (R. 67).

5. The Supreme Court of Pennsylvania erred in concluding that the inferences of fact to be drawn from the contents of the entire record of the Nevada proceeding, together with the facts alleged to have been admitted in the argument before the Superior Court, clearly showed that the jurisdictional fact of a Nevada domicil was lacking, whereas the evidence in the Nevada record fully supported the decree of the Nevada court, and the alleged facts, de-

scribed as formally admitted in the quotation made from the opinion of the Superior Court (R. 60), were not only irrelevant but were also not in fact stipulated as agreed facts by counsel and were used by the Superior Court, without notice to or confirmation by counsel, in support of its decision on the issue of jurisdiction, which said issue had been injected into the case by the Superior Court of its own motion.

6. The Supreme Court of Pennsylvania erred in inferring that petitioner harbored on the date of the trial of his case in Nevada, which was also the date of his decree, an intention of leaving the State of Nevada immediately afterward and that his Nevada case was no different in legal effect from what it would have been if he had never been in that State but had arranged to have someone falsely impersonate him at the hearing, and in placing upon petitioner the burden of producing evidence to rebut the foregoing inferences made against him by the Supreme Court (R. 61).

ARGUMENT.

This case does not involve the duty to pay alimony.

In the courts below petitioner sought a release from an order which had been entered in a criminal, or at least a quasi-criminal, proceeding commenced by an information made by the relator wife, praying for the issuance of a warrant for petitioner's arrest (R. 32). In Allegheny County the County Court exercises in such cases the jurisdiction of the Court of Quarter Sessions. The legislation authorizing this type of proceeding is a part of the Criminal Code of the State of Pennsylvania, Act of April 13, 1867, P. L. 78, § 2, 18 P. S. § 1252; as amended by Act of June 24, 1939, P. L. 872, § 733, 18 P. S. § 4733.

It is the law of Pennsylvania that maintenance of a proceeding of this kind presupposes the existence of the marriage relation. When an order has been entered in a proper case, such order automatically loses its validity upon the cessation or dissolution of that relation. In *Commonwealth v. Kuraiker*, 96 Pa. Super. Ct. 553, 1929 the rule was stated thus by Judge Trexler: "When the marriage relation ceased to exist, the order of the court was properly vacated because there was no duty on the husband to pay to this woman's support when she ceased to be his wife."

The only qualification upon the husband's right to a vacation of the support order is that he pay all installments which accrue under the order down to the date of his divorce decree. *Commonwealth v. Parker*, 59 Pa. Super. Ct. 74 (a Nevada decree case). Admittedly petitioner has complied with this requirement. His payments actually extend beyond the date of his decree.

Petitioner's proceeding below was filed in reliance upon the decision of this Court in the Williams case.

We wish to stress at the outset of this brief certain features of petitioner's case which could not very well be indicated in the foregoing Concise Statement of the Case.

Before petitioner arrived in Nevada in the summer of 1941, he had severed completely his ties, social and business, with Pennsylvania. It is true that in the latter state he had twice unsuccessfully sought to be divorced. He had, however, complied without objection with the terms of the support order made at the wife's instance by the Pennsylvania domestic relations court (County Court). He must be presumed to have known that under the rule of *Haddock v. Haddock* a Nevada divorce would not release him from the terms of that order within the limits of the State of Pennsylvania. On the other hand, he was entitled to believe that upon the strength of the rule of the *Haddock* case, it was open to him to apply for and receive a Nevada divorce that would permit him to remarry and live in domestic peace in Nevada and in any other state of the Union except Pennsylvania. He acted upon that belief and made no effort to seek an invalidation of the support order.

However, after the decision of this Court in the *Williams* case, he followed the advice of counsel to the effect that with the overruling of the *Haddock* case he was justified in applying for a vacation of the support order. To his surprise he learned very quickly that the Pennsylvania courts took the position that as far as this petitioner was concerned, the overruling of *Haddock v. Haddock* was an apparently immaterial circumstance. His Nevada divorce was by those courts regarded as entirely nugatory in Pennsylvania, but erroneously on grounds which were held to have been always available to courts of the matrimonial

domicil without reliance or dependence upon *Haddock v. Haddock* and as specifically sanctioned by *Bell v. Bell*, 181 U. S. 175, 21 S. Ct. 551.

We consider *Haddock v. Haddock* to have been a decision intended to furnish a workable rule with respect to the effect to be given in the matrimonial domicil to a divorce obtained in the court of a sister state upon substituted service. As the instant case came clearly within the scope of that decision as so interpreted, we experience considerable difficulty in attempting to surmise the views of the Pennsylvania judges and justices, who participated in the decisions below in this case, as to what this Court intended to accomplish by the overruling of *Haddock v. Haddock*, or as to what the occasion was for the concern so clearly manifested by the dissenting members of this Court in the *Williams* case. This difficulty is resolved to some extent by the observations of Kenworthey, *J.*, (R. 52), where it is intimated that Mr. Justice Jackson did not correctly grasp what this Court did in the *Williams* case. It would seem, indeed, that the decision below is a deliberate attempt to circumvent the result in the *Williams* case by means of an unsound and unwarranted use of the decision in the case of *Bell v. Bell*.

We contend that the decision below ignores completely the distinction between the faith and credit required to be given judgments of the courts of sister states and that to which local common and statutory law is entitled, a distinction which this Court pointed out in the *Williams* case, and applied more recently in *Magnolia Petroleum Co. v. Hunt*, 319 U. S. 734, 64 S. Ct. 208, citing the *Williams* case.

It would, therefore, appear to be in order to charge the courts below with having evaded "the constitutional issue in this case on the easy assumption that petitioner's domicil in Nevada was a sham and a fraud." 317 U. S. 292, 63 S. Ct. 210.

The decision below is not in conformity with the principles established by the Williams case.

Were the courts of Pennsylvania correct in reasoning that although *Haddock v. Haddock* has been overruled, the case of *Bell v. Bell*, 181 U. S. 175 still stands as an authoritative precedent and as such required the entry of the judgment now brought here for review?

We believe and respectfully urge that the Pennsylvania state courts misconceived the real result reached in *Bell v. Bell*. They failed to see the radical difference between the factual situation there and that which is disclosed by the record in the present case.

In *Bell v. Bell* this Court permitted the New York court to deny validity to the Pennsylvania decree presumably because it appeared that the New York court had been convinced by evidence submitted to it that the husband had not been in fact a resident of Pennsylvania for the required period of time before the institution of his action there, and that his representation to the contrary to the Pennsylvania court had been false. Admittedly the wife had never been a resident of Pennsylvania. She was served only by publication. Admittedly Bell had sworn falsely, either in Pennsylvania or in New York, as to his residence. Furthermore, he had seen fit to offer no evidence in defense of his wife's suit in New York to show that he had actually changed his residence from New York to Pennsylvania. He apparently chose to stand upon the conclusive effect of his Pennsylvania decree. Until the real facts as to his residence had been developed in the New York case, it seems doubtful whether the mere offer of the New York affidavit should have been held enough to overcome the presumptive validity of the Pennsylvania decree. The New York court's grant of a divorce to the wife on the ground of adultery

was a result entirely consistent with the rule later announced in *Haddock v. Haddock*, and was actually the same as the ruling of the New York divorce court passed upon and considered in the case of *In Re Holmes Est.*, 219 N. Y. 261, 52 N. E. 2d 424. The actual result in the *Holmes* case leads us to believe that the effect of the *Bell* case decision was to leave the Pennsylvania decree valid in Pennsylvania, in accordance with the principle later announced in *Haddock v. Haddock*. But with the overruling of *Haddock v. Haddock*, even the New York courts would now, in the purely suppositious event of the death of either Bell or his second wife at this time in New York, grant letters of administration to the survivor on the ground of the validity of their marriage contracted upon the strength of Bell's Pennsylvania divorce.

It would appear that the basic reasoning of *Bell v. Bell* must be that the Pennsylvania court, which granted Bell a divorce, would have been required (*i. e.* by this Court) to vacate its decree upon the showing to it, in the first instance, of the case which had been presented to the New York court, and that because the Pennsylvania court would presumably have done so, if the question had been first presented to it, the New York court was justified in ignoring the Pennsylvania decree. Whether upon this view the Pennsylvania court would have later been obliged to give full faith and credit to the New York decree, upon the theory suggested by the result in *Baldwin v. Iowa State Traveling Men's Ass'n.*, 283 U. S. 522, 51 S. Ct. 517, is a matter of conjecture.

When, in the opinion in the *Williams* case, this Court said that because that case had not been tried and submitted on the issue of domicil alone, this Court had no occasion then to meet the problem which would have been presented

under *Bell v. Bell*, and that because that issue did not have to be met, no opinion on it was being intimated (317 U. S. 292, 63 S. Ct. 210), we believe that what this Court then intended to suggest was that the prosecution in the *Williams* case might on a second trial be able to offer evidence of such gravity (*e. g.* like the affidavit in the *Bell v. Bell* case) as to require the Nevada court itself, if the same evidence were offered there, to set aside its own decree. The clear intimation seems to us to inhere in this Court's language that unless such evidence, if produced, would be deemed sufficient for that purpose in Nevada, it would be equally ineffective in the North Carolina court upon the retrial. And over and above all that, we believe that this Court was thereby leaving open an occasion for a reconsideration of *Bell v. Bell* and the somewhat similar cases of *Streitwolf v. Streitwolf*, 181 U. S. 179 and *Andrews v. Andrews*, 188 U. S. 14.

It does not seem unreasonable in such situations to require the absent spouse to apply to the divorce court for relief from an adverse decree, alleged to have been improperly obtained, or better still, to conform to a new public policy, which would require the absent spouse to come into the foreign court in the first place to challenge the right of the libellant to proceed there for the relief prayed for. The latter alternative was resorted to by the wife in *Andrews v. Andrews*, 188 U. S. 14, and in *Davis v. Davis*, 305 U. S. 32, 59 S. Ct. 3. It is reasonable to suppose that all courts would compel suitors to defray the expenses and counsel fees of the absent spouses. The magic of the so-called matrimonial domicil, which Mr. Justice Holmes tried so hard to dispel in his dissent in *Haddock v. Haddock* and which is now specifically discarded by this Court (317 U. S. 301), would then disappear entirely and the spouse remaining in the matrimonial domicil, so-called, who has

been heretofore the beneficiary of the rule of *Haddock v. Haddock*, would be obliged to realize, when now served with actual notice of a pending divorce case, that if he or she should elect not to defend the case, and the foreign court should proceed to the entry of a decree on the basis of its own jurisprudence as to what are the requirements of jurisdiction and the grounds for divorce, a decree so entered will be final in every state of the Union. Such a policy should not permit the non-appearing absent party to relitigate in the domestic forum the issue of domicil.

Even under Bell v. Bell the courts below were not warranted in denying full faith and credit to petitioner's divorce decree and in placing upon petitioner the burden of going forward with evidence in support of his claim of domicil.

a. *The Condition of the Record on the Subject of Domicil.*

The fact situation with respect to petitioner's removal to and residence in Nevada, as furnishing a ground for the denial of full faith and credit to petitioner's decree, was first adverted to upon the argument of the appeal of this case to the Superior Court. Accordingly, the record upon that subject is in an unusual condition. The chief responsibility for that situation is in our opinion assignable to the failure of counsel for respondent to rely in the trial court upon the defense of lack of acquisition of a domicil in Nevada. As already stated, petitioner relied upon the presumption of validity.

We feel justified in asserting that the failure of respondent to rely upon and to assume the burden of sustaining the defense of lack of domicil was due to the non-existence of any facts tending to prove that defense. The offer of

evidence with respect to petitioner's prompt transfer of residence to Cleveland was made by respondent apparently for the purpose of supporting the pleaded charge of fraud in not disclosing to the Nevada court petitioner's two previous unsuccessful attempts to procure a divorce in Pennsylvania. The contention of counsel seemed to be that the Nevada court would have been obliged to treat such denial of his right to a divorce as *res judicata*. The trial court decided the case on that theory. Had the case been tried on the issue of domicil, petitioner could have shown many facts, not in this record, which would have supported his position. In the absence of any indication from respondent that she could have shown additional facts negativing the existence of domicil, she must be held to have rested her challenge of the validity of the Nevada court decree upon the meagre showing in the record of an alleged suppression of information concerning the prior Pennsylvania divorce litigation. On appeal, it was contended for respondent that the trial court had correctly decided the case on this theory of *res judicata*.

Had respondent's claim of fraud related to lack of acquisition of domicil, the supporting facts should have been pleaded, for under the often cited Pennsylvania authority of *Commonwealth v. Cronhardt*, 127 Pa. Super. 501 and 135 Pa. Super. 117, the burden was clearly upon respondent to establish the facts negativing the jurisdiction of the Nevada court. Petitioner was fully justified in relying upon the presumption of validity. In the *Cronhardt* case the foreign decree was based upon substituted service and yet it was deemed to be presumptively valid.

In *Hammell v. Britton*, 19 Cal. 2d 72, 82, 1941; 119 P. 2d 332, 338, it is said:

> "• • • There are no allegations of the facts constituting the fraud. It is elementary that in an action for

equitable relief based upon extrinsic fraud in obtaining judgment, the facts constituting the fraud must be pleaded with particularity and specifically * * *."

b. *Treatment of the Case by the Pennsylvania Superior Court.*

The facts of the instant case did not warrant the summary assumption by the two Pennsylvania appellate courts (Superior and Supreme) of the right to regard petitioner's claim of domicil in Nevada as a fraud and a sham. The facts relating to domicil were not fully developed, because the issue of acquisition of domicil was not raised in the County Court. The case was disposed of by the judge of that court upon the ground of *res judicata* (R. 50). The untenability of this ground was specifically ruled by the Superior Court (R. 56). That court, however, undertook to pass upon the questions of jurisdiction and domicil. These questions were raised by the court itself, presumably because they afforded a simple means of affirming the order of the trial court. It is true that these questions were orally discussed at the argument (R. 54, foot-note), but the discussion was precipitated by comments from the members of the court, who intimated that the record itself of the Nevada proceeding contained enough to show that petitioner had committed a fraud on the Nevada court with respect to the nature of his residence in that state, and that petitioner's claim of a bona fide domicil was nothing but a sham. The views expressed from the bench were entirely consistent with and remarkably similar to those contained in the dissenting opinion of Mr. Justice Jackson in the *Williams* case.

The opinion writer of the Pennsylvania Superior Court reasoned that this Court had in the *Williams* case reaffirmed *Bell v. Bell*, for otherwise "if the court had been of opinion that mere residence for the required period would

support a valid decree it would have directed that defendants be discharged" (R. 53). Presumptive validity of petitioner's Nevada decree was conceded, but "until the Supreme Court of the United States gives us a different test of domicil" (R. 55), the right was asserted to apply their own test to what were assumed to be the facts of this case concerning domicil. And it was then held that petitioner had not established "a bona fide domicil in the absence of proof of other circumstances which, under our decisions, are regarded as essentials of domicil" (R. 55). No comment was made on the very apparent variances between the facts of petitioner's case and those of the petitioners in the *Williams* case, a variance which would seem to us to be distinctly in favor of the petitioner here. Nor was any inquiry made as to the *res judicata* quality in Nevada of petitioner's decree. No acknowledgement or recognition was made of the manifest incongruity of permitting a re-examination in the domestic forum, and according to the rules of local jurisprudence, of a subject which had been before the foreign court for determination in the first instance, and where, under our federal system, the foreign court was well within the limits of due process in deciding that matter in accordance with its own established jurisprudence relating thereto. Patently, therefore, the Superior Court flouted the full faith and credit provision by undertaking to brand petitioner's domicil as a fraud and a sham.

c. *Treatment of the Case by the Pennsylvania Supreme Court.*

As we read the opinion of the Supreme Court of Pennsylvania the reasoning of the Superior Court was not followed (R. 59). A new method of upholding the decision of the County Court was evolved. This new approach

seems to us to place an undue and unfair emphasis upon questionable points of procedure. It was reasoned that if petitioner had tendered an exemplification of nothing but his decree, he would have been entitled to prevail, but having opened up the issue of acquisition of domicil by offering an exemplification of the whole proceeding in Nevada; he thereby brought the facts of his alleged Nevada domicil under review by the Pennsylvania courts. It was further held that the facts shown by the Nevada record, together with those appearing in the record of the desertion proceeding itself, and particularly in a deposition given by petitioner in support of his application for a reduction of the support order, raised a presumption of invalidity against petitioner which it then became his duty to overcome. It was suggested in particular that he should have undertaken to explain the conditions which developed immediately after his Nevada divorce, "which made it desirable that he should again change his domicil from Nevada to some other state" (R. 61).

This treatment of petitioner's case by the Pennsylvania Supreme Court tends to distinguish it from the situation in the second *Williams* case, being submitted concurrently with the instant case. We shall now attempt to point out what we believe to be error in the reasoning of the Pennsylvania Supreme Court.

The Supreme Court of Pennsylvania placed its decision upon what we regard as an untenable position when it held that if petitioner had presented to the County Court nothing but a duly certified copy of his divorce decree, his wife would then have been required to produce evidence to overcome the "*prima facie* effect" of the decree (R. 60).

Several misconceptions inhere in the foregoing statement. The full faith and credit provision relates to "pub-

lic Acts, Records, and Judicial Proceedings", not to judgments or decrees as such. The constitutional provision requires the rendering of *full* faith and credit, not a mere *prima facie* effect. If the finding of jurisdiction is upheld by the certified record, the burden is on the opposite party to sustain the plea of lack of jurisdiction. The presumption of validity applies in divorce cases even where jurisdiction rests upon substituted service.

In *Freeman on Judgments*, 5th Ed. § 1030, page 2149, it is said:

> "An incomplete record of a suit for divorce is not admissible, either to prove a divorce by a court of competent jurisdiction, or that a party thereto 'in good faith believed she had been divorced', though the rule is otherwise where the decree is offered merely to corroborate a witness and not an as estoppel."

See also *Shilling v. Seigle*, 207 Pa. 381, 1904, that an exemplification of an Ohio judgment offered by plaintiff will be presumed to be a full copy of the entire record where the clerk certifies that it is a full and complete transcript of the proceedings had in the case; and *Christine v. Whitehill*, 16 S. & R., 98, 106, 1827, where it is indicated that a clerk's certificate of a Pennsylvania Orphans' Court proceeding should conclude with the statement that the copy of the records is "so full and entire as in his office they remained."

The offer of an exemplification of the mere divorce decree as such would have been subject to objection. On the other hand, the entire proceedings, being those of a court of general jurisdiction and certified as here pursuant to the Act of Congress, required the Pennsylvania court to treat the decree, which was regular on its face, as presumptively valid, for concededly the evidence in the record was sufficient both to sustain the jurisdiction of the court and the truth of the charge or ground for divorce

relied upon. See cases cited in the dissenting opinion of Mr. Justice Drew (R. 65). It is the "judicial proceeding", authenticated as directed, which is entitled to full faith and credit (R. S. § 905, 28 U. S. C. A. § 687). When so authenticated, it has not merely a "*prima facie* effect". The court in which it is offered is subject to the command of the constitutional provision and of the statute cited to accord it *full* faith and credit, by which is implied such faith and credit as would be given it in the courts of the State in which it was rendered. The true inquiry was, therefore, not what the Pennsylvania court thought about the *bona fides* of petitioner's claim of acquisition of domicil, but whether the wife had produced any evidence which would have required the Nevada court to invalidate its decree on the ground of lack of jurisdiction. Admittedly she had not. Instead she offered a part of petitioner's evidence in the Nevada court. See comments of Drew, J. (R. 65). Petitioner was therefore fully entitled to the benefits of the presumption of the validity of his divorce decree.

In the case of *Estate of Weichers*, 199 Cal. 523, 250 P. 397, 1926; certiorari denied *Weichers v. Weichers*, 273 U. S. 762, 47 S. Ct. 476, where a woman attempted to claim a widow's share of the estate of a California decedent, her claim was dismissed in favor of a woman whom the decedent had married after obtaining a divorce from claimant in an Ohio court upon the basis of substituted service of process. It was contended by claimant that the certified record showed lack of jurisdiction in the Ohio court to enter a valid decree. It was said by Finch, J.: "The presumption is the same where service has been made by publication as where personal service had been had. *McHatton v. Rhodes*, 143 Cal. 275, 279."

It is possible that his Honor, Mr. Justice Linn, in making the distinction between the whole record and the decree

as such had in mind the principle of law that if the certified record shows on the face of it lack of jurisdiction, the domestic court may regard the judgment as what it is, *i. e.*, a nullity. In such a case the defendant need not go forward with evidence to show lack of jurisdiction. It was so held in *Settlemier v. Sullivan*, 97 U. S. 444, 24 L. Ed. 1118 (1879). Admittedly this principle has no application to the instant case. Nowhere was it suggested in the opinions of the courts below that the Nevada court lacked jurisdiction on the basis of the certified record which petitioner offered in evidence. The decree was therefore presumptively valid. Mr. Justice Linn was, however, of opinion that the evidence set forth in the record, coupled with the additional circumstances referred to, namely residence by petitioner in a hotel during his stay in Nevada and a removal described as immediate to Ohio after obtaining his decree, was enough to justify a denial by the Pennsylvania intermediate appellate court, *of its own motion*, of full faith and credit to petitioner's Nevada decree. In this we believe there was palpable error.

Had the wife offered any testimony to challenge petitioner's claim of acquisition of a Nevada domicil, petitioner could then have shown why he removed so soon from Nevada to Ohio. Until afforded an opportunity to do so in an orderly way, and only when obliged to do so, he could have shown the "conditions [which] developed immediately afterward" (R. 64), which caused him to remove to Ohio when he did. He was improperly characterized by the Pennsylvania court as having misled the Nevada court as to his domiciliary intent (R. 62).

It was also reasoned below that if petitioner had supplemented his testimony before the Nevada court "by the fact that he would leave the state immediately afterward,

the court *would have been justified* in declining to make a finding that his Nevada domicil was bona fide" (R. 61) (Italics ours). This reasoning is in our opinion erroneous. Its error vitiates the entire case of the majority justices of the court. The inquiry is directed to an irrelevant matter, namely, what the Nevada court might have been *justified* in doing. Without quarreling with the use by the court of the word "immediately", because the record shows that petitioner had left Nevada and was living in Cleveland within the comparatively short time of six or seven weeks, we contend that that fact does not require the inference that he intended to leave at the time he testified on September 8, 1941. Certainly it does not require that the Nevada court should have held that he did so intend at the time he testified, or that this Court would convict the Nevada court of error is not so holding. In our opinion the words "would have been justified in declining to make a finding that his Nevada domicil was bona fide" mean little more than that the court "might have" so found. And if the court "might have" so found, then conceded it might not have so found. Its action in finding as it did is not subject to collateral attack in a proceeding in the courts of another state. Petitioner's act in leaving when he did was not inconsistent with his testimony. The Pennsylvania court was without justification in imputing to petitioner an intention to mislead the Nevada court.

The decision of this Court in *German Savings & Loan Society v. Dormitzer*, 192 U. S. 125, 24 S. Ct. 221, 1904, may be authority for the action of the Pennsylvania appellate courts in treating the matter of jurisdiction as being in issue, when it had not been pleaded, but it is also authority for upholding our contention that the disposition made of this case by the Supreme Court of Pennsylvania as outlined above was a clear evasion of the Con-

stitution. In the *Dormitzer* case the facts which were held to be sufficient to warrant the Washington court in ignoring the Kansas court's divorce decree were strikingly like those which would have been fully developed had the relator wife attempted here to disprove petitioner's Nevada domicil, and such facts, if proven here, would have strengthened petitioner's case instead of weakening it. It is as if the husband in the *Dormitzer* case had been divorced in Washington and later had become involved in litigation in Kansas in which the supposed Washington divorce would have been challenged on the ground that he had never acquired a domicil in Washington. In the instant case the Pennsylvania Supreme Court ignored record facts relating to the finality of petitioner's departure from Pennsylvania which are strikingly similar to those developed in the *Dormitzer* case. These facts are, however, stressed in the dissenting opinion below (R. 66). If in the *Dormitzer* case such facts were sufficient to oust the Kansas court of jurisdiction, so, contrariwise, they should be sufficient, in the present case, to uphold the jurisdiction of the Nevada court. The contingency discussed by Mr. Justice Holmes in the *Dormitzer* case is exactly what has occurred in the present case. We quote:

> "It very well may be that, if the Supreme Court of Washington had undertaken to deny the jurisdiction of the Kansas tribunal without evidence impeaching it, such an evasion of the Constitution would not be upheld. It may be that in fact some circumstances were adverted to by that court which hardly warrant an inference. . . ."

The decision below in the *Dormitzer* case, invalidating the Kansas divorce, was affirmed only because the record disclosed that there was evidence to support the state court's finding that the husband had changed his domicil to Spokane about two months before filing his libel for divorce in

Kansas. In the instant case, the record discloses no such evidence and no such finding.

"d. *The Pennsylvania Appellate Courts Undertook to Deny the Jurisdiction of the Nevada Court without Evidence Impeaching It. Such an Evasion of the Constitution will not be Upheld.*"

The outstanding circumstance in this record in favor of petitioner on this question of jurisdiction is his departure from Pennsylvania in the summer of 1941, never to return. Manifestly he has lost his Pennsylvania domicil. He has effectively established a domicil at the present time in Ohio. His contention is that after giving up his Pennsylvania domicil, he acquired and maintained a domicil in Nevada. The court of that state has decided with all due formality and compliance with due process of law that he did so acquire a domicil in that state. How then could the Pennsylvania courts fail to give full faith and credit to the decree of the Nevada court?

The record of the Nevada proceeding is self-sustaining on the question of jurisdiction. What facts are alleged below to overcome the presumption of validity? Only three facts are stressed: (1) that petitioner, who had arrived in Nevada in June, 1941, lived in a hotel during his stay there, (2) that petitioner left Nevada immediately after obtaining his divorce on September 8, 1941, and (3) that he had established a residence in Cleveland, Ohio, in the latter part of October, 1941.

We are at a loss to understand the action of the courts below in emphasizing the fact of residence in a hotel. Notoriously, hotels are frequented by guests who may be either transients or permanent guests. We believe this court will take judicial notice of the circumstance that

many persons live in hotels who are unquestionably domiciliaries of the state where the hotel is located. That petitioner was assumed by the courts below to have lived in a hotel while in Nevada is, therefore, in our opinion of no significance whatever in justifying or supporting the result reached below.

In the second place, the promptness of petitioner's removal from Nevada is also a wholly immaterial circumstance so far as furnishing any support for an attack upon the Nevada court's finding in favor of domicil. By definition a domicil of choice implies the right to commence or to terminate a person's domicil at will, at any time and for any reason.

And finally, how the fact that petitioner had established a residence in Cleveland in October, 1941 could have any relevancy on the issue of a Nevada domicil is more than we can understand.

We are constrained, therefore, to believe that both Pennsylvania appellate courts, in grasping at such flimsy grounds for upholding the decision of the trial court, which had been based upon an admittedly unsound reason, thereby clearly disclosed their aversion to the new rule of law as announced by this Court in the *Williams* case.

This attitude of the Pennsylvania Supreme Court is not surprising in view of the history of the prior disposition of this question by that court. As early as 1838 in the case of *Dorsey v. Dorsey*, 7 Watts 350, Chief Justice Gibson wrote an elaborate opinion affirming the action of a trial court which had refused to entertain a libel filed by a woman, who had married and lived with her husband in Pennsylvania, but had later gone with her husband to live in Ohio. Upon her return to Pennsylvania she charged her husband with desertion in Ohio. "The appellant's

case, therefore, appertains to the authorities in Ohio. The forum is there, and the law which declares the offense is there * * * the person of the transgressor was not subject to our jurisdiction at the time of the fact; for an attempt to bind him without it, or without hearing or notice, would be extravagant." And with respect to the full faith and credit provision upon the ultra-territorial force of a sentence of divorce by a court of competent jurisdiction, the learned Chief Justice said "* * * nothing in the federal constitution or laws has been thought to touch the question of jurisdiction, and the members of the union therefore stand towards each other, in relation to it, as strangers."

The foregoing decision was interpreted by Mr. Justice Agnew in 1867 in the case of *Colvin v. Reed*, 55 Pa. 375, as holding "that jurisdiction depends on the real domicil of the parties at the time and place of the injury." It was held that a Pennsylvania wife was not ousted of her dower rights in Pennsylvania real estate by a divorce obtained on substituted service by the husband in an Iowa court upon the charge of desertion by the wife in Pennsylvania. As the wife had never appeared, it was held that she could not be affected by the actions of the husband in taking up a new domicil in Iowa and in obtaining a divorce there.

We are not aware that the Pennsylvania Supreme Court was obliged to consider whether and to what extent the principles announced in the foregoing two cases were affected by the ruling of this Court in 1901 in *Atherton v. Atherton*, 181 U. S. 155. Such an examination was rendered unnecessary by the ruling made shortly thereafter in 1906 by this Court in *Haddock v. Haddock*, on the strength of which, the minority states, including Pennsylvania, "* * * took new courage and (except in a few minor par-

ticulars; where the Haddock decision had wrought a change) continued to follow their old view." Beale, Haddock Revisited, 39 H. L. R. 419.

It is our position that the Pennsylvania Supreme Court was, therefore, quite naturally disposed to limit as far as possible the consequences resulting from the overruling of *Haddock v. Haddock*. The opinion of the majority shows a clear, although unacknowledged, preference for the views theretofore expressed in the early Pennsylvania cases above referred to.

We contend that under the principles firmly established by the *Williams* case, it was petitioner's clear privilege to take up a residence in Nevada. His place of abode there became his domicil. "The place where a man lives is properly taken to be his domicil until facts adduced establish the contrary." Jackson, J., *District of Columbia v. Murphy*, 314 U. S. 441, 455 (1941).

We contend that the finding of the Nevada court in favor of domicil was not only right, but that it was based on due process, and was not subject to collateral attack, except on grounds that would invalidate it upon direct attack in Nevada as being entirely void and not merely voidable. No such grounds are shown in the record of this case. The language quoted by Mr. Justice Holmes in his dissent in *Haddock v. Haddock* from *Christmas v. Russell*, 5 Wall. 290 is, therefore, applicable here. "If the judgment is conclusive in the state where it was pronounced, it is equally conclusive everywhere." This follows, he says, because there is no exception in the words of the Constitution.

Section 113 of the Restatement of Conflict of Laws reflects in part the revised views of Beale (cf. Haddock Revisited, 39 H. L. R. 417, 1926). Section 113 (a) (ii) ex-

presses the forced emphasis upon the element of fault, as elaborated by Beale in the article cited.* In developing this element of fault, Beale was obliged to argue that the actual judgment in *Haddock v. Haddock* was inconsistent with the husband's having been validly divorced at his domicil (39 H. L. R. at page 420). With the overruling of the *Haddock* case, "the hopeless refinements introduced by that case," including presumably the emphasis placed upon this element of fault, must be treated as no longer of any weight. Beale is dead. Our conjecture is that if he had lived, he would have been willing to revise his views once more and to express his approval of the position taken in the concurring opinion of Mr. Justice Frankfurter in the *Williams* case. The provisions of the Restatement must accordingly be considered as no longer authoritative, particularly in the light of the following statements by Mr. Justice Frankfurter (317 U. S. 307, 63 S. Ct. 217):

> "* * * It is indisputable that the Nevada decrees here, like the Connecticut decree in the *Haddock* case, were valid and binding in the state where they were rendered." (And as we read the context, the meaning is that it was immaterial whether the North Carolina court had or had not seen fit, in disposing of the case, to regard the Nevada decrees as "a fraud and a sham.")
>
> "* * * Freed from the hopeless refinements introduced by that case (*Haddock*), the question before us is simply whether the Nevada decrees were rendered under circumstances that would make them binding against the absent spouses in the state where they were rendered. * * *"

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* "§113. State of Domicil of One Spouse.

A state can exercise through its courts jurisdiction to dissolve the marriage of spouses of whom one is domiciled within the state and the other is domiciled outside the state, if

(a) the spouse who is not domiciled in the state * * *

(ii) by his or her misconduct has ceased to have the right to object to the acquisition of such separate home; * * *"

In the instant case no question has been raised as to the validity of service in our Nevada proceeding. Nor could it have been, even under Section 109 of the Restatement of Conflicts. Service having been made in accordance with the provisions of the Nevada Statutes (R. 35, 36), the decree was as binding upon respondent "* * * as if she had been served with notice in Kentucky [Nevada], or had voluntarily appeared in the suit." Gray, J., in *Atherton v. Atherton*, 181 U. S. 155, 21 S. Ct. 544 at 550.

Returning again to the question of petitioner's acquisition of a Nevada domicil and his testimony with respect to his assumption of a permanent residence in Nevada, we wish to quote the following language of Chief Justice Sterrett in *Price v. Price*, 156 Pa. 617, 1893 (cited with approval of Mr. Justice Day in *Gilbert v. David*, 235 U. S. 561) at page 626:

> "* * * This (domicile of choice) is acquired by actual residence coupled with the intention to reside in a given place or country, and cannot be acquired in any other way. For that purpose, residence need not be of long duration. If the intention of permanently residing in a particular place exists, a residence in pursuance of that intention, however short, will establish a domicile. The requisite animus is the present intention of permanent or indefinite residence in a given place or country, or, negatively expressed, the absence of any present intention of not residing there permanently or indefinitely. * * *"

We contend, therefore, that petitioner was justified in stating, and the Nevada court was warranted in finding (and free from collateral attack), that his new residence in Nevada was presumptively "permanent" in the sense assigned to the word by Chief Justice Sterrett in the foregoing quotation. (See quotations from Holmes, J., *infra*, in *Williamson v. Osenton*.) With respect to Clark County, Nevada, "It was his place of abode, which he had no pres-

ent intention of changing; that is the essence of domicile", Mr. Justice Day in *Gilbert v. David, supra.* He was telling both the "literal truth" (Holmes, J., in *Williamson v. Osenton*, 232 U. S. 619) and the actual truth, in the only relevant sense in which the Nevada court was interested in knowing about the nature of his stay; namely, that he was there for a residence of indefinite duration, and had abandoned all intention of returning to his former domicil. Had he been interrogated as to his intention with respect to returning to Pennsylvania, he undoubtedly would have explained the complete severance by him of his former business and social ties in that state (R. 6). He had burned his bridges behind him, as shown by the admitted fact of his failure to return. Deciding to come East, rather than to remain in Nevada or to go West, he settled in Cleveland.

It seems to us that both the Superior and the Supreme Courts of Pennsylvania insisted upon ascribing to the word "permanent" the denotation or meaning of "everlasting" or "forever". In Crabb on English Synonyms it is stated under the heading, "Durable, Lasting, Permanent":

> "DURABLE is said of things that are intended to remain a shorter time than that which is LASTING: and PERMANENT expresses less than *durable* * * *".

In Merriam-Webster's Dictionary of Synonyms under a heading which lists: "Lasting, permanent, perdurable, durable, stable, perpetual", it is said in part:

> "* * * Lasting usually implies long continuance with no end in sight: in this sense, it may be equivalent to *everlasting* * * *. More often, however, it does not imply endlessness, but rather a surprising capacity to continue indefinitely * * *. *Permanent* applies chiefly to things which are not temporary * * * but which continue or are likely to continue indefinitely: as, a *permanent* position; a *permanent* arrangement; * * *."

The Nevada court was therefore, not misled by petitioner. That court was entirely free to place its own construction upon the sense or meaning in which the word "permanent" was used by counsel in the questions addressed to petitioner. That the word actually had the connotation of "indefinite permanent abode" in Nevada is indicated by the statement of Mr. Justice Jackson at page 224 (63 S. Ct.): "If Nevada may prescribe six weeks of indefinite permanent abode in a motor court as constituting domicile, she may as readily prescribe six days." The Nevada court was similarly free, in making its own finding, to use the word in the sense of "for an indefinite time", for it must be assumed that the court was familiar with the general fact situation as to the residence of petitioner in Nevada. The Nevada court was, therefore, fully justified in finding the existence of an actual *animus manendi*, accompanied by a physical transfer of residence.

A further development of the fact situation would have, in our opinion, only confirmed the Nevada trial judge in the correctness of his finding of domicil. How can it be argued here that his finding is not binding in Nevada on the absent spouse? If binding there, it is binding on her everywhere in the Union.

> . . . . Manifestly the question whether or not the plaintiff in the action had resided in the State of Nevada for a sufficient length of time to bring his case within the operation of the statutes of that state was a question to be adjudicated by that court. This necessarily follows if the provision of the Federal Constitution is to be given its due weight. . . . . per Heid, J. at page 82, *Commonwealth v. Parker*, 59 Pa. Super. Ct. 74, 1915.

We are inclined to think that under the particular facts of petitioner's case he has a better standing to ask for the according of full faith and credit to his decree than do

the great majority of recipients of Nevada divorces, and, that if the *Williams* case means nothing to him, no such recipient can benefit from the handing down of that decision. Surely both the majority and the minority of the justices of this Court will be surprised to find that the *Williams* decision has been so construed. Why, for instance, were the minority justices so vigorous in their dissents, if the way was being left open for such easy invalidation of Nevada decrees as was accomplished by the decision of the Pennsylvania courts in this case?

Had the question of petitioner's domicil been put in issue in the Nevada court, the gist of the inquiry so raised would, it seems to us, have been whether petitioner still retained his previous Pennsylvania domicil. In determining that question the Nevada court would have been properly guided by the rules of law relating to domicil which have been quite recently summarized by Mr. Justice Jackson in the above cited case of *District of Columbia v. Murphy*, 314 U. S. 441, where the question involved related to the retention by government employees working in Washington of domicil in their home states. As there stated (p. 456):

> "In order to retain his former domicile, one who comes to the District to enter Government service must always have a *fixed and definite intent to return* and take up his home there when separated from the service * * *." (Italics ours.)

In view of the admitted circumstance in this case that petitioner severed once and for all his connection with his former Pennsylvania domicil, it is eminently proper for us to stress this point, because as was said by Mr. Justice Jackson in the *Murphy* case at page 457:

> "All facts which go to show the relations retained to one's former place of abode are relevant in determining domicile. What bridges have been kept and what have been burned * * *?"

Previously the learned Justice had said, p. 454, "On the other hand, we hold that persons are domiciled here who live here and have no fixed and definite intent to return and make their homes where they were formerly domiciled." That language applies exactly to the situation petitioner found himself in while he resided in Nevada. Had domicil entailed obligations to Nevada, he would have been required to acknowledge them.

Or looked at in the light of the broad rules which furnish "a divining rod in locating domicile" (see note 10, p. 455 of the *Murphy* case), where was petitioner's "home" from June to October of 1941, if not in Las Vegas, Nevada? As stated in the said note: "In fact, the search for the domicile of any person capable of acquiring a domicile of choice is but a search for his 'home'."

That petitioner in the instant case saw fit to remarry and move to Cleveland after obtaining his divorce militates not at all against his bona fide acquisition of a Nevada domicil during the said period of his residence in that state. The facts appearing in this record negative any intention on his part to return to his former place of domicil in Pennsylvania. His decision, made shortly after his divorce, to remove to Cleveland, indicates only that he saw fit to exercise his right to adopt a new domicil of choice, a right which he fully enjoyed, while domiciled in Nevada, and a right which he could exercise or not exercise, as he pleased, and in favor of Ohio or any other state. Had he returned to Pennsylvania, (that is, acted as the divorced spouses did in the *Williams* case), it would have raised only a suspicion that the *animus manendi* may have been wanting." (See *Cheever v. Wilson, infra;*) The *Williams* case decided that such a suspicion is not the basis of a collateral attack upon the Nevada decree. Mr. Justice Jackson in his dissenting opinion so contended, but the majority refused to follow his reasoning. "It is this

Court that accepts these facts as enough to establish domicile," (Jackson, *J.*, 317 U. S. 321, 63 S. Ct. 224, and later at pages 323, 225, he brands the action of the majority as "a demoralizing decision." Would he have used that language if the decision of this Court was as harmless and ineffective as it has been rendered for Pennsylvania litigants by the decision here under review?

The admitted facts of the instant case relating to domicil bring it within the rules as stated by Mr. Justice Holmes in *Williamson v. Osenton*, 232 U. S. 619, 34 S. Ct. 442, namely:

> "The essential fact that raises a change of abode to a change of domicil is the absence of any intention to live elsewhere (Story, Conflict of Laws, § 43); or, as Mr. Dicey puts it in his admirable book, 'the absence of any present intention of not residing permanently or indefinitely in' the new abode. Confl. L. 2d ed. 111 . . ."

And that petitioner's motive in acquiring a Nevada domicil may well have been to enable him to become a suitor for divorce in its courts was an immaterial circumstance. In the *Williamson* case, for instance, it was stipulated that plaintiff went to Virginia from West Virginia, "with the intention of making her home in that state for an indefinite time in order that she might institute this suit against the defendant in the United States Court" in West Virginia. Said Holmes, *J.*:

> "We must take them (the words 'for an indefinite time') to mean: for a time to which the plaintiff did not then contemplate an end. If that is their meaning, the motive for the change was immaterial; for subject to the second question to be discussed, (a wife's right to acquire a separate domicile) *the plaintiff had a right to select her domicil for any reason that seemed good to her.*" (Italics ours.)

In the fairly early case of *Cheever v. Wilson*, 9 Wall. 108, 19 L. Ed. 604, 1870, it is stated at page 608, by Swayne, *J.*:

> "It is said the petitioner went to Indiana to procure the divorce, and that she never resided there. The only

question is as to the reality of her new residence and of the change of domicil. * * * That she did reside in the county where the petition was filed is expressly found by the decree. * * * The finding is clearly sufficient until overcome by adverse testimony. None adequate to that result is found in the record. Giving to what there is the fullest effect it only raises a suspicion that the *animus manendi* may have been wanting."

We respectfully suggest that the dissenting opinion of Mr. Justice Drew of the Pennsylvania Supreme Court has correctly applied the law to the facts of petitioner's case in the three paragraphs of analytical discussion which appear on pages 66 and 67 of the Record in this case. Nothing in the opinion of the Superior Court or in the opinion of the majority justices of the Supreme Court answers the contentions there made. It is strange that the unfair charge of fraudulent intent to evade the support order, which appears in the majority opinion (R. 61), should have been allowed to remain there and to afford a peg upon which the decision rests, in the light of the forthright statement of the uncontradicted facts, which appears in the dissenting opinion (R. 67).

By reversing the decision below and by directing the entry of an order in the form suggested by the dissenting opinion (R. 69), this Court will in effect approve not only the result reached in *Estate of Holmes*, 291 N. Y. 261, 52 N. E. 2d 424, but also the underlying reasoning of Chief Judge Lehman as set forth in his opinion for the majority judges in that case, and particularly in that portion thereof which is quoted in the dissenting opinion of Mr. Justice Drew in this case (R. 68).

A substantial federal question is involved.

At the hearing before the County Court Judge (Gunther), petitioner offered a properly certified exemplification of his Nevada court decree (R. 34). In his petition (R.

10), he had relied upon the element of *full faith and credit* to which his said decree of divorce was entitled. Article 4, Section 1 of the Federal Constitution provides that Full Faith and Credit shall be given in each State to the Public Acts, Records and Judicial Proceedings of every other State, and Congress is empowered to prescribe by general laws the manner of proving such Acts, Records and Proceedings. At the hearing in the County Court, petitioner, in offering the exemplification of his decree (R. 35), made specific reference to the Act of Congress (R. S. Sec. 905, 28 U. S. C. A., Sec. 687), which provides the method of certification followed in this case and which requires that judicial proceedings so authenticated "shall have such faith and credit given to them in every court within the United States as they have by laws or usage in the courts of the States from which they are taken." Petitioner was relying in the said County Court of Allegheny County upon rights and privileges conferred upon him by the Constitution of the United States and by the aforesaid Act of Congress, passed pursuant to the said constitutional provision. He renewed this contention before the Superior Court and finally in the Supreme Court of Pennsylvania (R. 57). His contention now is that all the said Pennsylvania courts failed to follow the mandatory provision of the aforesaid Section 1 of Article 4 of the Constitution and of the Act of Congress passed pursuant thereto. Petitioner contends here that his complaint in this respect raises a substantial federal question.

Respectfully submitted,

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FILE COPY

Supreme Court of the United States

October Term, 1944. No. 20.

WILLIAM F. ESENWEIN,
Petitioner,
vs.
COMMONWEALTH OF PENNSYLVANIA, Ex Rel.
MAY H. ESENWEIN.

BRIEF FOR RESPONDENT, MAY H. ESENWEIN.

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SUPREME COURT OF THE UNITED STATES.

October Term, 1944. No. 20.

WILLIAM F. ESENWEIN,

Petitioner,

vs.

COMMONWEALTH OF PENNSYLVANIA, EX REL. MAY H. ESENWEIN.

BRIEF FOR RESPONDENT, MAY H. ESENWEIN.

OPINIONS OF COURTS BELOW.

The Opinion of the Supreme Court of Pennsylvania is reported in 348 Pa. 455; 35 A. 2d 335 (R. 59). The Opinion of the Superior Court of Pennsylvania, which was affirmed by the Supreme Court, is reported in 153 Pa. Super. Ct. 69; 33 A. 2d 675 (R. 51).

JURISDICTION.

The jurisdiction of this Court is invoked under 28 U. S. C. A. Sec. 344(b), Judicial Code, Section 237(b), as amended.

CONCISE STATEMENT OF THE CASE.

The Petitioner and Respondent were married in Pennsylvania, November 22, 1899 and lived together until 1919. In November, 1919 Petitioner left his wife, son and daughter, and shortly thereafter brought an action in divorce alleging cruel and barbarous treatment and indignities. More than ten years later a hearing was had and a decree entered in his favor in common pleas for indignities was reversed by the Superior Court of Pennsylvania (105 Pa. Super. Ct. 261), affirmed on appeal, by the Supreme Court of Pennsylvania on March 20, 1933 (312 Pa. 77). The parties have not lived together since 1919. Petitioner later brought a second action for divorce, charging desertion. A decree entered by Common Pleas Court, Allegheny County, in Petitioner's favor was reversed on October 4, 1940 by the Superior Court of Pennsylvania, (141 Pa. Super. Ct. 604). It was not appealed from.

Eight months later, Petitioner went to Nevada, arriving in Las Vegas, Clark County, on June 23, 1941 (R. 22), and in precisely six weeks time to the day he filed a complaint (R. 11) on August 5th, 1941 against his wife, May H. Esenwein, alleging a living apart for more than three consecutive years (R. 12). After a hearing on September 8, 1941 (R. 21), a decree of divorce was awarded on the same day (R. 18-19). Petitioner testified that he came "with the intention" of making Clark County, Nevada, his "permanent place of residence" (R. 22), but left Nevada immediately after obtaining his divorce, as admitted in open Court in oral argument in the Superior Court of Pennsylvania by Petitioner's counsel, and as pointed out by Judge KENWORTHEY (R. 55) in the Opinion of the Superior Court. The Record shows in addition, and it is admitted, that "since some time in October, 1941", Petitioner has resided at "2635 North Moreland Boulevard, Cleveland, Ohio", (R. 42; R. 6-7, Par. Seventh) having remarried.

Relying upon his Nevada decree, Petitioner on February 1, 1943 filed a Petition for Revocation of an Order for the support of his wife in the County Court of Allegheny County, Pennsylvania (R. 10), alleging that Petitioner and Respondent were no longer husband and wife, since September 8, 1941, the date of the Nevada decree.

May H. Esenwein, Respondent, filed an answer (R. 27-28), denying the validity of the Nevada decree, and contended that the matters involved were Res Adjudicata, which contention was subsequently eliminated by the Superior Court and is no longer in issue. In said Answer (R. 28, Sixth Paragraph), Respondent also charged that the proceedings in Nevada resulting in the Nevada decree, "were conceived and executed in fraud both upon the States and Courts of Nevada and Pennsylvania". Petitioner asked for no more specific Answer as to the nature of the fraud. At the Hearing in the County Court (R. 30), Respondent read into the Record, from Deposition testimony of the Petitioner taken in Cleveland, Ohio, November 19, 1942 (R. 42), which disclosed the Petitioner's residence in the month following the decree, October, 1941, as Cleveland, Ohio, contradicting his Nevada testimony as to his "intention" to make Nevada his "permanent place of residence" (R. 43). Petitioner did not object to the introduction of said deposition testimony into the Record (R. 42-43). The County Court (GUNTHER, J.) heard said deposition testimony but based his Opinion in favor of Respondent on the ground of Res Adjudicata, and refused to revoke the support order. The Superior Court of Pennsylvania sustained the decision of the County Court, but on the ground of fraud, and on the ground that, in addition to the Petitioner being a resident of Cleveland, Ohio, in October, 1941, soon after the Nevada testimony of September 8, 1941 where Petitioner avowed an "intention" of residing permanently in Nevada (R. 43). Petitioner's counsel admitted in open Court during argument in the Superior Court that "we could assume he left Nevada *immediately* after obtaining his divorce" (R. 55, Opinion,

Judge KENWORTHEY). Respondent in her Brief in the Superior Court of Pennsylvania devoted an entire section covering pages 27 to 36 inclusive under the heading, "Did the Nevada Court Have Jurisdiction Either of the Parties or of the Cause of Action?" The issue of bona fide domicile, and the challenge thereto, distinctly and clearly raised by Respondent in the hearing in the County Court (See Record p. 38: bottom R. 37), (R. 42) was thus raised again in the Superior Court of Pennsylvania. The statement of Petitioner (Brief for Petitioner, p. 4) that the issue of domicile in Nevada had not been raised in the County Court, is incorrect, because Respondent's open contention in the County Court that Petitioner "came immediately after September 8, 1941, to Cleveland, Ohio" (R. 38, top) is supported by deposition testimony, (R. 42). The "Concise Statement" of Petitioner (p. 5) is incorrect, Petitioner says, that "When the case was heard on appeal in the Superior Court the judges of that court injected of their own motion the issue of acquisition of domicile over our protest that the issue had not been raised by the pleadings and had not been heard or passed upon by the trial court". The issue of domicile was raised by the charge of fraud in Respondent's Answer (R. 28, Par. Sixth); it was heard in the County Court (R. b. 37: R. 38: R. 42; R. 44; R. 45). The issue of bona fide domicile was again raised by Respondent in the Superior Court as stated, in her printed Brief and said issue was not "injected" by the Judges of that Court "of their own motion". Counsel for Petitioner admitted in open Court during argument in the Superior Court, that we could assume Petitioner left immediately after obtaining his divorce in Nevada (R. 55, Opinion Judge KENWORTHEY). From the Order of the Superior Court affirming the order of the County Court (R. 51-56), Petitioner appealed to the Supreme Court of Pennsylvania which affirmed the judgment of the Superior Court (R. 59-R. 62); dissenting Opinion (R. 63). Petitioner then presented his Petition to this Court for Writ of Certiorari at No. 668 October Term, 1943, in this Court,

which on March 6th, 1944 was denied; but subsequently, to-wit, on June 12th, 1944 was granted at No. 20 October Term, 1944. The Petitioner has paid no regular monthly arrearages for support of his wife-Respondent on the Order of December 8th, 1942 (R. 9), though formally promising to do so (R. 41), when this case is adjudicated,—which it apparently was, at least from March 6th, 1944 to June 11th, 1944. It has been formally stated, by counsel for Petitioner that Mr. Esenwein is a non-resident and therefore, not amenable to process of capias or bench warrant, (R. 41). Meanwhile Petitioner stays out of Pennsylvania, and the Order of Court of December 8th, 1942 (R. 9) still stands though not honored at any time by any monthly payments since its inception.

Comment on Specifications of Errors.

(Petitioner's Brief, pp. 6, 7).

1. That the Courts below erred in failing to give full faith and credit to the Nevada decree in divorce:—On the admission of Petitioner's counsel that Petitioner left Nevada immediately after obtaining his divorce there (R. 55, Opinion Judge KENWORTHEY), and on the admission of leaving Nevada to reside in Cleveland, Ohio, shortly after September 8th, 1941, the date of the Nevada decree (R. 6, Par. Seventh; R. 18; 19), the Pennsylvania Appellate Courts concluded as a matter of law, on said undisputed facts (Dorrance's Estate, 309 Pa. 151, p. 156; 163 At. 303, p. 304) that Petitioner had no intention to establish a bona fide domicile in Nevada (R. 55; R. 61). The Nevada decree was therefore entitled to no faith and credit in Pennsylvania:

Thompson v. Whitman, 18 Wallace, 457; 462;
Bell v. Bell, 18 U. S. 175;
Andrews v. Andrews, 188 U. S. 14;

Bowditch v. Bowditch, 314 Mass. 410; 50 N. E. 2d, 65;
Noffsinger v. Noffsinger, 50 Fed. Supp. 810; 814.

2. That the Courts below erred in disregarding Petitioner's Nevada divorce decree (on ground of lack of jurisdiction in the Nevada Court), in the absence of competent evidence attacking the Nevada jurisdiction:—The Petitioner himself recapitulates the "three facts" in evidence (Petitioner's Brief, p. 25):—

(a) Petitioner made no attempt to establish a home in Nevada but lived there only the necessary preliminary six weeks in a hotel (R. 60, note);

(b) "Petitioner left Nevada immediately after obtaining his divorce on September 8, 1941" (Petitioner's Brief, p. 25) (R. 55);

(c) "He had married and established a residence in Cleveland, Ohio, the next month, October, 1941" (Petitioner's Brief, p. 25) (R. 6; R. 42). The evidence was competent; the facts were admitted; it became a pure matter and conclusion of law for the Courts below to decide; they had authority to make the Decision:—

Wilson v. Eisner, 282 F. 38, p. 42; holding,—
"Since the facts and circumstances are *admitted the question* of whether the plaintiff was engaged in business for profit or pleasure, *became one for the Court to decide.*" (Italics ours)

Dorrance's Estate, 309 Pa. 151, p. 156; 163 At. 303, p. 304:—
"The determination of decedent's domicile in this appeal *is a conclusion of law*, based upon facts, most of which are undisputed." (Italics ours)

Test of domicile was properly applied by Courts below as enunciated in Dorrance's Estate, (supra):

"And until the Supreme Court of the United States gives us a different test of domicile, we apply our own":—

(R. 55, Opinion Superior Court of Pennsylvania.)

3. That the Supreme Court of Pennsylvania erred in reciting in its Opinion that the issue of fraud was tried in the County Court, i.e., "that the proceedings in Nevada were conceived and executed in fraud upon the states and courts of Nevada and Pennsylvania, whereas the only real issue or defense raised by the wife in the County Court was that of Res Adjudicata."

Petitioner is entirely incorrect, because:—

(a) The issue tried in the County Court,—(in addition to the question of Res Adjudicata, *now no longer an issue in this case*)—*was* clearly and distinctly the *issue of fraud*, to-wit, the proceedings on the part of the Petitioner to obtain a divorce in Nevada, without establishing a bona fide domicile there:—

"fraud . . . that is, to procure a divorce without obtaining a bona fide domicile in such other state":

Andrews v. Andrews, 188 U. S. 14.

The Record on pages 37 (Bottom), 38, shows the open argument in County Court at the Hearing on the subject of fraud, that is, failure of bona fide domicile, and the legal necessity therefor; bottom Record page 37: top of Record page 38, reading:

Mr. Seligsohn: "First, the necessary six weeks residence . . . and in addition thereto a bona fide intention to *remain*. . . . In violation of his pretended, sworn statement that he intended to *remain* there in Nevada, (he) *came immediately after September 8th, 1941, to Cleveland, Ohio.*" (R. 38, top)

This was supported in the Record by Petitioner's former Deposition testimony, exposing him residing only a few weeks after he got his Nevada decree NOT in Nevada, as he swore he intended, but in Cleveland, Ohio, where he lived,—particularly at 2635 No. Moreland Blvd.—

"A. Since some time in October, 1941." (R. 42)

How long he lived in Cleveland at some other address or addresses before that is not disclosed by the Record, though it is admitted he left Nevada immediately after September 8th, 1941, (R. 55, Opinion, Judge KENWORTHEY).

(b) That the "only" real issue or defense raised by the wife in the County Court was that of Res Adjudicata, in view of the above, is obviously misleading and incorrect. *Two* distinct and clear issues were raised by the wife-Respondent both in her Answer (R. 28) and as above pointed out (R. 37, bot.; R. 38), to-wit, Res Adjudicata and lack of Nevada jurisdiction through failure of intention to establish a bona fide domicile in Nevada (R. 42 contra R. 43). The Opinion in favor of Respondent in the County Court (on the ground of Res Adjudicata), was sustained by the Superior Court *on the ground of fraud and failure of intention* to establish a bona fide domicile in Nevada: *"He did not establish a bona fide domicile"*, (R. 55, Judge KENWORTHEY, Opinion, Superior Court). The Superior Court dismissed the issue of Res Adjudicata: it is no longer in this case and is not relevant. (See Heading Respondent's Brief herein, page 31 . . ., entitled "AS TO THE CHARGE OF FRAUD").

4. That the Supreme Court of Pennsylvania erred in its conclusion that the Superior Court was justified in inferring that proceedings in Nevada were "a sham and a fraud for the purpose of evading the support order of the County Court (R. 61)". From what has gone before it must be obvious this was the whole purpose of the Nevada

proceedings and *still continues to be*. The whole fight and litigation is an effort by the Petitioner to avoid paying the monthly support due his wife, as ordered in the Order of Court of December 8th, 1942 by the County Court of Allegheny County (R. 9); without this obvious motive, this whole litigation becomes meaningless.

As set forth clearly in our above Reply to Petitioner's 2nd Specification of Error (supra), and on the "three facts" admitted and recapitulated by Petitioner himself (p. 25, Brief for Petitioner) the Courts below, *on said admitted facts* were authorized to conclude that Petitioner never did intend to establish a bona fide domicile in Nevada —"He had no intention of making his domicile in Nevada" (R. 61, Opinion, Justice LINN),—and that said pretensions (R. 22), were a "*sham and fraud*" (R. 61), *regardless of what the motive.*

The Courts below were authorized to make the conclusion:—

> Wilson v. Eisner, 282 F. 38, p. 42;
> Dorrance's Estate, 309 Pa. 151, 156; 163 At. 303, 304.

The Petitioner has not paid a single monthly payment of $75.00 or any part of a monthly payment on said Order of Court of December 8th, 1942 (R. 9), from that day to this. Promises that "all arrearages will be promptly paid, when and as his case is adjudicated" (R. 41) have been totally disregarded. From March 6th, 1944 to June 11th, 1944 when to all knowledge of all parties, the litigation was finally "adjudicated", the Petitioner refused as he had previously refused, to honor said Order of Court by making monthly paymen s. The statement of Petitioner on page 41 (R. 41) of the Record is eloquent, that:—

> "Mr. Esenwein is a non-resident and therefore, not amenable to process of capias or bench warrant", (R. 41).

5. That the Supreme Court of Pennsylvania erred in concluding that the inferences of fact to be drawn from the contents of the entire record . . . together with the facts alleged to have been admitted in the argument before the Superior Court, clearly showed jurisdictional fact of intention to establish a bona fide domicile was lacking.

On the admitted facts that Petitioner left Nevada immediately after obtaining his Nevada divorce (R. 55) and the removal to Cleveland, Ohio, (R. 42), the Courts below did not err in their Conclusion of Law, which they were authorized to make:—

> Dorrance's Estate, 309 Pa. 151, p. 156; 163 At. 303, 304.

The admission that Petitioner left Nevada immediately (R. 55) referred to in Opinion by Justice LINN (R. 60) was not, as Petitioner says, "irrelevant", but extremely important and very material and very relevant.

6. That the Supreme Court of Pennsylvania erred in inferring that Petitioner harbored on Sept. 8, 1941, the date of his Nevada Hearing and Divorce Decree, "an intention of leaving the State of Nevada immediately afterward". The quickest reply to this is that that is *exactly* what Petitioner *admitted* that he did do, to-wit, "left Nevada immediately after obtaining his divorce decree" (R. 55, Opinion, Judge KENWORTHEY).

ARGUMENT.

1. WAS PETITIONER DEPRIVED OF ANY RIGHTS UNDER ARTICLE IV, SECTION 1, OF THE FEDERAL CONSTITUTION?

The Petitioner was deprived of no right under Article IV, Section 1, of the Federal Constitution. This provision

does not, and did not in the instant case, prevent inquiry into the jurisdiction of the Nevada Court. The Constitutional provision that full faith and credit shall be given in each State to the public acts, records and judicial proceedings of every other State, does not bar or preclude an inquiry into the jurisdiction of the Court by which a judgment or decree offered in evidence is rendered:

> "*Neither the constitutional provision* that full faith and credit shall be given in each State to the public acts, records and judicial proceedings of every other State,—(nor the Acts of Congress passed in pursuance thereof), *prevents an inquiry* into the jurisdiction of the Court by which a judgment offered in evidence was rendered." (Italics ours).
>
> THOMPSON v. WHITMAN, 18 Wallace, 457; 462, 463 (1873);
>
> BELL v. BELL, 181 U. S. 175; 21 S. Ct. 551 (1901).

The Courts of Massachusetts were,—

> "*not obliged to enforce* a decree of divorce, obtained in another State, as to persons domiciled in Massachusetts and who go into such other State with the purpose of *practising a fraud* upon the laws of the State of their domicile, that is, *to procure a divorce without obtaining a bona-fide domicile in such other State.* (Italics ours).
>
> ANDREWS v. ANDREWS, 188 U. S. 14 (1902).

> "*The full faith and credit clause* of the Constitution *does not preclude inquiry into jurisdiction* of Court in which judgment is rendered over subject matter or parties affected or into *facts necessary to give such jurisdiction, before extending* full faith and credit to such judgment. U. S. C. A. Const. Art. 4, Sec. 1. . . . *bona fide residence on part of petitioner is essential to the validity* of a decree of divorce, and *recitals* in divorce proceeding *of facts* necessary to show jurisdiction, *may be contradicted.*

"It is competent for Courts of OTHER States to inquire into the validity of a divorce so far as its validity depends upon jurisdiction of the State where the divorce was granted. . . . Domicile by one of the parties . . . is essential." (Italics and emphasis ours)

BOWDITCH v. BOWDITCH, 314 Mass. 410; 50 N. E. 2d, 65 (7-13-43).

"The divorce is *invalid* in Nevada for another reason Noffsinger went to the state solely for the purpose of obtaining a divorce. He had *no intention to reside there permanently or indefinitely.* He quit the state the 9th day of May, 1942." (The very day the divorce was granted).

NOFFSINGER v. NOFFSINGER, 50 Fed. Supp. 810; p. 814 (July 20th, 1943).

In the case at bar, likewise, the Petitioner William F. Esenwein, "left Nevada immediately after obtaining his divorce" (R. 55), precisely as happened in the said cited Noffsinger Case.

It is apparent that the right of the Petitioner, Esenwein, to claim the benefit of the full faith and credit clause (Art. IV, Section 1), for the Nevada decree in Pennsylvania, hinges directly upon whether or not—(notwithstanding said constitutional provision)—the jurisdiction of the Nevada Court could nevertheless be challenged by inquiry as to whether or not bona fide domicile in Nevada existed; and whether or not, as to the *animus manendi*, the Petitioner had a real INTENTION to remain in Nevada permanently, and to there establish a domicile.

The cases just cited give us the undoubted right to challenge the jurisdiction of the foreign Court—in this case, Nevada. As was said in the Opinion of the Superior Court of Pennsylvania (KENWORTHEY, J.):

. . . "The decree is open to collateral attack and a recital in the proceedings that such domicile existed *may be contradicted.*"

(R. 51; citing Bell v. Bell, and Andrews v. Andrews, supra.)

The precise issue, of whether or not the jurisdiction of the foreign Court may be inquired into, and whether or not such jurisdiction is subject to collateral attack, is clearly and precisely joined between the parties in this case at bar. Respondent May H. Esenwein maintains the affirmative, but the Petitioner at page 23 of his Brief says:—

> Its (Nevada Court's) action in finding as it did is NOT subject to collateral attack, in a proceeding in the Courts of ANOTHER State," (Emphasis ours).

(a) Was the Nevada decree subject to collateral attack?

> "On the whole, we think it clear that the *jurisdiction* of the Court by which a judgment is rendered in ANY STATE *may be questioned* in a *collateral* proceeding IN ANOTHER STATE, notwithstanding the provision of the fourth Article of the Constitution, and *notwithstanding the averments in the record of the judgment itself.* (Italics ours)
>
> THOMPSON v. WHITMAN, 85 U. S. 457, at page 469.

As Justice LINN writing the Opinion of the Supreme Court of Pennsylvania in the case at bar said:

> "There is no doubt of the power of the Courts below to inquire into the jurisdictional facts necessary to confer jurisdiction on the Nevada Court; Bell v. Bell, 181 U. S. 175; Streitwolf v. Streitwolf, 181 U. S. 179; Andrews v. Andrews, 188 U. S. 14", etc. . . .
>
> (R. 60; 349 Pa. 451 (1944); 35 A. 2d 335).
>
> "A bona fide domicile being a *jurisdictional fact, its existence is subject to challenge* before the Courts of

other States, notwithstanding a finding of 'residence' or 'domicile' upon the divorce record." (Italics ours)

(Prof. Lorenzon's analysis of WILLIAMS v. NORTH CAROLINA; Volume 52 Yale Law Journal, page 353).

"The right to impeach *collaterally* a decree of divorce made *in another state*, by showing *fraud* or *want of jurisdiction*, has been frequently recognized."

COMMONWEALTH v. YARNELL, 313 Pa. 244; 251.

Challenging a decree in divorce emanating from the District Court of Dawson County, State of Nebraska, the Supreme Court of Pennsylvania said:

"The court in this instance had no jurisdiction."

Fyock's Estate, 135 Pa. 522. (1890).

Challenging a decree issued by the District Court of Saline County, Nebraska, the Supreme Court of Pennsylvania said:

"The grounds of appeal are . . . whether the divorce obtained in that state (Nebraska) is valid or not (and) *cannot be inquired into." . . . "The Nebraska court was without jurisdiction, and its decree a nullity."*

HEIN'S ESTATE, 22 Pa. Super. Ct. 31; 32, 33 (1903).

If, based on the *fact* of *lack of the animus manendi*,— the lack of real, honest *intention* to establish a bona fide domicile in Nevada, we come to the conclusion of law (Dorrance's Estate, 309 Pa. 151, at page 156; 163 At. p. 304), that Nevada had no jurisdiction, then it follows as a legal conclusion that the Nevada decree "is entitled to NO FAITH AND CREDIT" in Pennsylvania. For, where, for example, the husband was NOT a bona fide resident of Pennsylvania, it was held that:

"A decree of divorce obtained in the State of Pennsylvania *in which neither party is domiciled,* upon service by publication, and in *another* state, is ENTITLED TO NO FAITH AND CREDIT IN THAT STATE." (Emphasis and italics ours).

BELL v. BELL, 181 U. S. 175; 21. S. Ct. 551 (1901);

ANDREWS v. ANDREWS, 188 U. S. 14; 23 S. Ct. 237 (1903).

In the case at bar the petitioner by his counsel openly admitted as a fact, that Petitioner Esenwein left Nevada immediately after obtaining his decree; Judge KENWORTHEY writing the Opinion of the Superior Court of Pennsylvania says (R. 55),—

"We were also told at the oral argument that we could assume he *left Nevada immediately after obtaining his divorce.*"

In addition, the testimony of Petitioner on the Nevada witness stand on Sept. 8th, 1941, pronounced under solemn oath, that he "came to Nevada . . . *with the intention* of making Clark County, Nevada" his "permanent place of residence"; and that he "retained *that intention* ever since"; and that he had it (said intention) "now" (R. 22; R. 43), is contradicted over the Petitioner's own signature *in the record* (R. 7), where Petitioner avers that "On or about October 18th, 1941, petitioner became a resident of the State of Ohio", (R. 6). The same contradiction appears from a Deposition of Petitioner admitted into the Record when Respondent in the County Court hearings (R. 30, at Record page 42) sought to show the fraud on the part of the Petitioner, alleged in the Answer of Respondent May H. Esenwein (R. 27-28; Paragraph Sixth).

From said Depositions, counsel for Respondent, without objection, read the following into the Record:

"Q. Where do you live, Mr. Esenwein?

A. 2635 North Moreland Boulevard, Cleveland, Ohio.

Q. Mr. Esenwein, how long have you lived at 2635 North Moreland?

A. Since some time in October, 1941." (R. 42)

(See Record, page 42; at Record page 43 appears the verbatim testimony of Petitioner, September 8th, 1941, in Nevada, as to his "intention" to establish a bona fide domicile, a permanent place of residence in Nevada.)

The reason given in the County Court hearing below by counsel for respondent, for placing contradictory testimony of Petitioner in the Record, was to expose the lack of bona fide intention as to the establishment of a domicile in Nevada by Petitioner:—

> We said: "That is for the purpose of a comparison of the testimony in the records". (R. 43).

The record shows that Petitioner had already ensconced himself in his Cleveland home "Some time in October, 1941" (R. 42), i.e. "on or about October 18, 1941"; that he left Nevada immediately after obtaining his divorce (R. 55). Judging Petitioner by his ACTS and conduct as against his mere words, even though under oath, (Dorrance's Estate, 309 Pa. 151, page 156; 163 At. page 304); he did NOT have the animus manendi—the *intention* of remaining; he did NOT intend to establish a bona fide domicile in Nevada. This being the case, *can the Petitioner escape the lack of Nevada jurisdiction by hiding behind the full faith and credit clause?* Can he be permitted to protest against the exposure of his own fraud and mala fides (R. 28, Par. Sixth; R. 22 & R. 6, Par. Seventh; R. 42 & R. 43; R. 55, "left Nevada immediately", etc.)—and at the same time demand that the Nevada decree be honored in Pennsylvania under the full faith and credit clause of the Federal Constitution?

The answer is clearly given in the negative;—the lack of the Nevada jurisdiction will be inquired into, and may

be exposed notwithstanding the full faith and credit clause which will not serve Petitioner as a shield.

THOMPSON v. WHITMAN, 85 U. S., 457 at p. 469.

The insistence of Petitioner in claiming that he has been deprived of "rights and privileges guaranteed him by Art. IV, Sec. 1, of the Federal Constitution", is simply another way of insisting on his, Petitioner's, position, that the Constitutional provision, in and of itself, and without discussion, *bars inquiry* into the question of the jurisdiction of the Nevada Court. The use by Petitioner of the word "guaranteed" lends no strength whatever to his claim.

Article IV, Section 1, supra, was not intended as a refuge for those who practice *mala fides* and fraud upon the laws of the State of their domicile,—(here Pennsylvania). Where a libellant went to a foreign state for the purpose of practising a fraud upon the laws of Massachusetts, the State of his domicile, i.e., to obtain a divorce in the foreign jurisdiction without obtaining a bona fide domicile there, Massachusetts refused to recognize such foreign decree; Andrews v. Andrews, 188 U. S. 14 (1902).

Petitioner established no bona fide domicile in Nevada; he never intended to do so; the result was that the Nevada Court therefore had no jurisdiction. Therefore, the "full faith and credit" clause has no relevancy to the situation, and Petitioner has not been deprived of any rights under Article IV, Section 1, of the Federal Constitution.

II. DID THE PENNSYLVANIA COURTS HAVE AUTHORITY TO DETERMINE THE REAL INTENTION OF PETITIONER AS TO THE ESTABLISHMENT OF A BONA FIDE DOMICILE IN NEVADA ADVERSELY TO PETITIONER, THUS INVALIDATING THE NEVADA JURISDICTION AND DECREE?

At the argument of this case in the Superior Court of Pennsylvania the Petitioner openly took the position that

he had a right to go to Nevada, stay there just long enough to get his decree and to leave at once thereafter, in spite of his, Petitioner's testimony in the Record, given in Nevada, (R. 22; R. 42-43), that he *intended* to remain in Clark County, Nevada, as his "permanent place of residence".

The position of Petitioner is still the same, and is reiterated in his Brief, at page 26, as follows:—

> "In the second place, the *promptness of petitioner's removal from Nevada* is also a WHOLLY IMMATERIAL circumstance so far as furnishing any support for an attack upon the Nevada court's finding in favor of domicil". (Emphasis and italics ours).

In other words, the Petitioner reiterates and stands upon his admission made in open Court, to President Judge KELLER, in oral argument in the Superior Court of Pennsylvania, that we could take it for granted and without further proof or discussion, that Petitioner left the State of Nevada immediately after he obtained his divorce: "We were told at the oral argument that we could assume he left Nevada immediately after obtaining his divorce", (R. 55). Petitioner not only reiterates the "*promptness* of petitioner's removal from Nevada" *after* obtaining his decree but Petitioner goes further and asks, "What of it"? Petitioner considers it entirely of no moment, no importance whatever. The contradiction between swearing on the witness stand in Nevada, on Sept. 8th, 1941 that he intended to make Nevada his "permanent place of residence", and then in the face of such testimony, leaving "immediately", and with "promptness", after the granting of the decree, and admitting it in open Court (R. 55), is nothing to the Petitioner, it is "wholly immaterial", he says; (Petitioner's Brief, page 26). And this, in spite of the fact that *without the animus manendi*, the Nevada Court, *as a matter of law*, had *no jurisdiction*.

> Dulin v. Dulin, 33 Pa. Super. Ct. 4, 5 (1907);
> Halpine v. Halpine, 52 Pa. Super. Ct. 80, p. 86;
> Harrison v. Harrison, 69 Pa. Super. Ct., p. 582;
> Presson v. Presson, 38 Nevada Sup. Ct., p. 203;

State v. Williams et al., 224 N. C. 183; 29 S. E. 2d, 744.

The petitioner in effect, admits that the *animus manendi* was lacking, that he had no intention whatever of making Nevada his "permanent place of residence" (R. 42-R. 43). To all intents and purpose the Petitioner admits all this when he states, as he DOES (supra) that the immediate and prompt removal of Petitioner from Nevada after he got his decree is "wholly immaterial"; there is no other interpretation of Petitioner's bold gamble. To all intents and purposes the Petitioner is admitting that the Nevada Court had no jurisdiction, because, as a matter of FACT, he entertained no animus manendi; he virtually admits it, (R. 55).

Counsel for Petitioner in Nevada knew that it was necessary to establish on the Nevada record, not merely that Petitioner resided the preliminary six (6) weeks—(42 days)—in Nevada before filing his libel in divorce there, but that Petitioner also had the INTENTION, *presently existing as an actual fact in the mind* of the Petitioner, of establishing a bona fide domicile, a permanent place of residence in Nevada, i.e., the *animus manendi*. Otherwise, as a matter of law the Nevada Court would have no jurisdiction; "*to the factum of residence must be added the animus manendi*"—Presson v. Presson, 38 Nevada, p. 203.

"Two things must concur to constitute domicile—first, residence; secondly, the *intention* of making the place of residence the *home* of the party. There must be both *fact* and *intent*". (Italics ours)

CAREY'S APPEAL, 75 Pa. 201, p. 205.

"To acquire a domicile of choice two things must concur: (1) Physical presence in the place where domicile is alleged to have been acquired; (2) *Intent* to make that place the home of the party". (Italics ours)

DORRANCE'S ESTATE, 309 Pa. 151, p. 173; 163 Atl. 303.

(a) How was the Court to determine intention?

Was the real intention of the Petitioner to be determined merely by his words on the Nevada witness stand, or by his previous and subsequent conduct?

Here we arrive at the crux of this case.

The testimony in question of the petitioner in Nevada was:

> "Q. When you came to Nevada you came with the intention of making Clark County, Nevada, your permanent place of residence?
>
> A. Yes, sir.
>
> Q. Have you retained that intention ever since?
>
> A. Yes, sir.
>
> Q. And you have it now?
>
> A. Yes, sir".

The three vital questions are leading questions; the answers, perfunctory. The rule of law is to judge the intention of a person by his acts and conduct, and not merely by his words.

The case of DORRANCE'S ESTATE, 309 Pa. 151; 163 At. 303, is rich in its wealth of citations of authorities of acts versus words in determining domicile.

At page 170 (Dorrance's Estate, 309 Pa.) we read:—

> "More weight will be given to a person's acts than to his declarations, and when they are inconsistent the acts will control".
>
> 19 Corpus Juris, 438.
>
> "They—(words, recitals in deeds, wills, etc.)—are not controlling when contradicted by other facts and circumstances".
>
> Dalrymple's Estate, 215 Pa. 367, 371, quoting *Jacobs on Domicile*.
>
> "That acts speak louder than words is sound law as well as proverbial wisdom".
>
> Graham v. Dempsey, 169 Pa. 460, 462.

"On the question of domicile, less weight will be given to a party's declarations than to his acts".

Holt v. Hendee, 248 Ill. 288, 296.

"While residence in this case (naturalization) depends largely on intention, the intention is to be gathered from the acts of the petitioner rather than from his declarations".

In re Barron, 26 F. 2d, 106, 107.

"In Lord HALSBURY'S 'The Laws of England', volume VI, page 186, under the general topic of Domicile, it is stated . . . at page 187 . . . 'Expressions of intention written or oral, may be given in evidence, but such evidence . . . *cannot prevail against a course of conduct leading to an opposite inference*' ". (Italics ours)

Dorrance's Estate, 309 Pa., p. 168.

"With a few scattered expressions to the contrary the *law is generally settled* that, as regards the *determination of domicile*, a person's expression of desire may not supersede the effect of his *conduct*". (Italics ours)

Dorrance's Estate, 309 Pa. 151, p. 165.

At page 156 (Dorrance's Estate, 309 Pa. 151) we read:—

"The determination of decedent's domicile in this appeal *is a conclusion of law*, based upon *facts*, most of which are undisputed." (Italics ours)

Likewise, in the case at bar, the immediate removal of Petitioner from Nevada after obtaining his divorce, is not disputed; (R. 55; Brief for Petitioner, page 26). Petitioner's residence in Cleveland, Ohio, since October 18th, 1941 (R. 6, Par. Seventh) is undisputed.

These are facts, and the determination of Petitioner's domicile and whether or not maintained in Nevada, is a *conclusion of law*, on said facts. Further, "where a finding of fact is simply a deduction from other facts . . . and the

ultimate fact in question is purely the result of reasoning, *we are competent to judge of its correctness* and will draw our own conclusions from the facts as reported"; Dorrance's Estate, supra. (Italics ours). The intention *must* be determined by a person's acts, rather than by his words, because there is no other way to arrive at a determination. The rule in Dorrance's Estate, supra, is realistic, and saves us from being victimized by any pattern of legal, formal ritualism. (R. 22; R. 43), where subsequent conduct belies the sincerity of words spoken even under oath. (R. 22) (R. 42).

> "The divorce is invaiid in Nevada for another reason. Noffsinger went to the state solely for the purpose of obtaining a divorce. *He had no intention* to reside permanently or indefinitely there. *He quit the state the 9th day of May, 1942*". (The very day the divorce was granted). (Italics ours)
>
> Noffsinger v. Noffsinger, 50 Fed. Supp. 810, page 814 (July 20, 1943).

Intention must be determined by a person's acts.

> "If it appears from the *facts* that the *petitioner left the state shortly after the decree of divorce was granted*, a presumption might well be created that *no bona fide intention to establish a permanent home existed*" . . . "In this event the decree could be regarded by the Courts of *other* states as *invalid*". (Italics ours)
>
> (Prof. Lorenzon, on Williams v. North Carolina; Haddock v. Haddock) Vol. 52 Yale Law Journal, p. 353.

(b) Did the Pennsylvania Supreme Court have the authority to draw its own conclusion of law that Petitioner had no intention to establish a bona fide domicile in Nevada?

"The determination of decedent's domicile in this appeal is a conclusion of law, based upon facts, most of which are undisputed".

Dorrance's Estate, Supra.

"Where a finding of fact is simply a deduction from other facts . . . and the ultimate fact in question is purely the result of reasoning, we are competent to judge of its correctness and will draw our own conclusions from the facts as reported".

Dorrance's Estate, Supra.

The State of Pennsylvania has established its own test of domicile in Dorrance's Estate, 309 Pa. 151; 163 At. 303; and has lawfully applied its own rule as enunciated in Dorrance's Estate, supra.

"And until the Supreme Court of the United States gives us a different test of domicil, we apply our own. See Restatement, Conflict of Laws, Sec. 10": (From Opinion of Superior Court of Pennsylvania, R. 55; 153 Pa. Super. Ct. 69; 33 At. 2d 675.

The State of Pennsylvania has the

"supreme power to interpret and declare the written and unwritten laws of the State".

Brinkerhoff-Faris Co. v. Hill, 281 U. S. 673, p. 680; 50 S. Ct. 451.

Petitioner in his Brief (page 23) says:—

"Without quarreling with the use of the word 'immediately', because *the record shows that petitioner*

> *had left Nevada* and was living in Cleveland within the comparatively short time of six or seven weeks, we contend that that *fact* does not *require* the inference that he intended to leave at the time he testified on September 8, 1941". (Italics ours)

But the further fact appears (R. 55) that Petitioner left Nevada "immediately after obtaining his divorce"; (Opinion Superior Court of Pennsylvania). The decision of the ultimate fact, the real intention of the Petitioner, was within the province of the Pennsylvania Appellate Court, which was competent to draw its own conclusion of law.

Petitioner complains that the facts before the Pennsylvania Appellate Courts did not "require" the inference that Petitioner had no real intention to establish a bona fide domicile in Nevada. Whether or not the decision and conclusion of law arrived at by the Superior Court of Pennsylvania, affirmed by the Supreme Court of Pennsylvania, was "required" under the facts before said Court, was entirely for said Court to decide. This presents no substantial Federal or Constitutional question, and affords Petitioner no ground of complaint.

Petitioner complains in his 6th Specification of Error, (p. 8, Brief for Petitioner) that:—

> "The Supreme Court of Pennsylvania erred in inferring that petitioner harbored on the date of the trial of his case in Nevada, which was also the date of his decree, an *intention* of leaving the State of Nevada *immediately* afterward." (Italics ours)

But he *did* leave immediately after obtaining his decree as admitted in open Court, (R. 55). This, plus his admitted residence in Cleveland, Ohio, beginning "about October 18, 1941," (R. 6, Par. Seventh), furnished the facts upon which the Superior Court of Pennsylvania, affirmed by the Supreme Court of Pennsylvania, based its conclusion, that there was no intention to establish a bona fide domicile in Nevada.

III. IS THE DECISION AND CONCLUSION OF LAW OF THE PENNSYLVANIA APPELLATE COURTS AS TO THE LACK OF INTENTION ON THE PART OF PETITIONER TO ESTABLISH A BONA FIDE DOMICILE IN NEVADA, REVIEWABLE BY THIS COURT? IS ANY SUBSTANTIAL FEDERAL QUESTION INVOLVED?

The Pennsylvania Appellate Courts have found as a fact on the record testimony (R. 22; R. 42-43; R. 6, Par. Seventh), and upon the admission made in open Court, (R. 55, —"he left Nevada immediately . . .") that Petitioner did not intend to, nor did he establish a bona fide domicile in Nevada. (R. 55,—"he did not establish a bona fide domicil") and (R. 61,—"he had no intention of making his domicile in Nevada".)

This finding of fact and conclusion of law thereon was exclusively for the Pennsylvania Courts, (Dorrance's Estate, supra); and no substantial Federal question is involved.

". . . its interpretation was in the Illinois Courts and not here".

Drivers Union v. Meadowmoor Co., 312 U. S. 287, p. 294; 61 S. Ct. 552.

"An appeal from a state court must be dismissed for want of jurisdiction if no substantial Federal question is presented and the judgment rests upon an independent basis of state law adequate to support it".

Utley et al. v. St. Petersburg, 292 U. S. 106.

The test of domicile as enunciated in Dorrance's Estate, 309 Pa. 151, p. 156; 163 At. 303,—that intention to establish a bona fide domicile will be determined by one's acts and conduct rather than by one's words,—is the independent basis of the rule of law laid down in that case.

"And until the Supreme Court of the United States gives us a different test of domicile, we apply our

own", (R. 55, Opinion, in this case, Superior Court of Pennsylvania, 153 Pa. Super. Ct. 69; 33 At. 2d 675).

"The determination of decedent's domicile in this appeal is a conclusion of law, based upon facts, most of which are undisputed. . . . Where a finding of fact is simply a deduction from other facts . . . and the ultimate fact in question is purely the result of reasoning, we are competent to judge of its correctness and will draw our own conclusions from the facts reported".

Dorrance's Estate, Supra.

Petitioner argues (Brief, p. 25), that Pennsylvania Appellate Courts denied the Nevada jurisdiction "without evidence". He then proceeds paradoxically, to enumerate the items of evidence, and enumerates *three facts*, including the following:—

(1) That Petitioner left Nevada immediately after obtaining his divorce on September 8, 1941; and,

(2) That Petitioner had established a residence in Cleveland, Ohio in the latter part of October, 1941; (October 18, 1941; R. 6).

Petitioner disposes of and waives aside this evidence by arguing:—

(1) That "the promptness of Petitioner's removal from Nevada is "*wholly immaterial*"; and,

(2) "The fact that Petitioner had established a residence in Cleveland in October, 1941" being considered as relevant to Petitioner's actual intention, on the issue of Nevada Domicile, is "more than we can understand". (Brief, p. 26)

The facts of evidence, being undisputed, competent and material,—(the *animus manendi* being obviously lacking),

—the finding of facts and conclusion of law was for the Pennsylvania Appellate Courts, solely; Dorrance's Estate Supra, and no substantial Federal question is involved.

IV. IS PETITIONER BOUND BY ADMISSION OF HIS COUNSEL MADE IN OPEN COURT?

The issue involved in this case is the validity of the Nevada divorce decree in Pennsylvania. The Nevada decree is attacked upon the ground of fraud (R. 28, Par. Sixth; R. 42-43),—the lack of intention on part of the Petitioner to make Nevada his "permanent place of residence", that is, to establish a bona fide domicile in Nevada. In addition to the preliminary six weeks residence in Nevada, it was vitally necessary that the *animus manendi* exist, i.e., the honest intention to establish a bona fide domicile in Nevada. The whole matter of the Pennsylvania decision as to the Nevada jurisdiction, turned on whether or not this intention *did or did not exist in the mind of the Petitioner* as he testified in Nevada, on September 8th, 1941 (R. 22).

At the argument of this case in the Superior Court of Pennsylvania, President Judge KELLER very pointedly inquired of Petitioner's counsel as to the exact time that Petitioner left Nevada after September 8th, 1941, when he was awarded his decree; and the reply, as cited in the Opinion of said Court by Judge KENWORTHEY (R. 55) was, "that we could assume he left Nevada *immediately* after obtaining his divorce". Petitioner, in his Brief (page 25), among the "three facts" he mentions and discusses, *includes* the fact "(2) that petitioner left Nevada immediately after obtaining his divorce on September 8, 1941". Petitioner refers to it, quotes it, discusses it, and *does not deny it.*

The test of domicile applied was the principle enunciated in Dorrance's Estate, Supra, that Petitioner's true INTENTION is to be determined by his ACTS and CON-

DUCT,—not by his mere words. The act of the Petitioner in leaving Nevada immediately after obtaining his divorce there, as admitted in open Court, in addition to his unquestioned residence in Cleveland, Ohio, (R. 6, Par. 7; R. 42) only a few weeks after his testimony in Nevada (R. 43), exposed the lack of any intention on the part of Petitioner to establish a bona fide residence in Nevada. The Appellate Courts of Pennsylvania so found: Judge KENWORTHEY (R. 55) and Justice LINN (R. 61).

The case at bar is like the case of Noffsinger v. Noffsinger, 50 Fed. Supp. 810, p. 814 (July 20th, 1943) in that in both cases the libellant left the State of Nevada immediately after obtaining his decree.

The admission made by Petitioner's counsel in open Court bore directly upon the precise issue in the case, to-wit, Nevada jurisdiction which depended for its breath of life upon whether or not Petitioner had the intention to establish a bona fide domicile in Nevada.

Was the Petitioner bound by this admission of his Counsel made in open Court, (R. 55)?

The affirmative was held in the leading case of Oscanyon v. Arms Co. (1880), 103 U. S. 261; 263, as follows:—

> "The power of the Court to act in the disposition of a trial upon facts conceded by counsel, is as plain as its power to act upon the evidence produced. In the trial of a cause the admissions of counsel, as to matters to be proved, are constantly received and acted upon. . . . Indeed, *any facts, bearing upon the issues involved, admitted by counsel, may be the ground of the Court's procedure* equally as if established by the clearest proof." (Italics ours)

To the same effect is the case of:—

> Christy v. Atchinson T. and S. F. Ry. Co. (District Court, Colorado, 1914) 214 F. 1016 (page 1023) affirmed at 233 F. 255, (page 253);
> also, France v. Jefferson Electric Co. (C.C.A. 6th

Cir., 1939) 106 F. (2d), p. 610;
Smith v. Standard Manufacturing Co. (C.C.A. 2d Cir., 1918) 254 F. 427; p. 429.

The same principle is announced in the case of:
Best v. D. of Columbia, 291 U. S. 411 (1934),
in which case Chief Justice Hughes at page 415 said:—

"The power of the Court to act upon facts conceded by counsel is as plain as its power to act upon evidence produced."

Where the admission is contained in a *brief*, it was held in

Young Supply Co. v. Gulf Ry. Co. (C.C.A. 5th Cir., 1925) 5 F. 2d, 421, p. 423:—

"We may consider the statements in the brief as *admission of fact*." (Italics ours)

Where the admission of counsel is made in *argument* in open Court—(as in the case at bar)—in the case of:
N. Y. Evening Post Co. v. Chaloner (C.C.A. 2d Cir., 1920) 265 F. 204, p. 215, it was held:

"A court has a right to accept the admission of counsel *made upon argument* or trial of a cause, and may act upon it as circumstances require."

A case where the *admissions of counsel* were *made during argument* and form the Court's *basis* for a motion to dismiss entertainment of a Bill in Equity, is the case of:
Lyman v. Kansas City and A. R. Co., 101 U. S. 636, p. 639:—

"Such statement made in open Court, *binds the party* as much so as if specifically pleaded".

Illustrating and supporting the same principle of admissions by counsel as binding, "short of a compromise of a

client's claim or a confession of judgment", are the following cases:

Lenox Clothes Shop, Inc. v. Commissioner of Internal Revenue, 139 F. (2d) 56;

Clark v. Wilson Lumber Co. (C.C.A. 9th Cir., 1935) 101 F. (2d), 709.

These cases hold that: "*The admission is binding on defendant.*". And to the same effect and supporting the same principle are:—

State v. Levy, 262 Mo. 181; 170 S. W. 1114 (1914);

Comm. v. McMurray, 198 Pa. 51 (1901).

The fact that Petitioner in the case at bar left Nevada immediately after obtaining his divorce (R. 55) being admitted, the question of its legal effect, i.e., failure of intention to establish a bona fide domicile in Nevada, was a question for the Court.

In Wilson v. Eisner, (C.C.A. 2d Cir., 1922) 282 F. 38, p. 42, the Court said:—

"Since the facts and circumstances are *admitted*, the question of whether the plaintiff was engaged in business for profit or pleasure, became one *for the Court to decide.*"

Supporting the same principle, i.e., where the facts are admitted, the conclusion is one of law for the Court, is the case of:—

Dorrance's Estate, Supra:

"The determination of decedent's domicile in this appeal is a conclusion of law, based upon facts, most of which are undisputed."

"We must also take into consideration the *facts* formally admitted at the argument before the Superior Court": (R. 60, from Opinion of Justice LINN, Supreme Court of Pennsylvania).

We submit no Federal question is involved.

V. AS TO THE CHARGE OF FRAUD.

Respondent in the County Court charged that Petitioner's divorce proceedings in Nevada were conceived and executed in fraud. As stated in the history of this case (supra), the Petitioner had failed in two separate efforts to obtain a divorce in Pennsylvania from the Respondent, May H. Esenwein; Esenwein v. Esenwein, 312 Pa. 77; and Esenwein v. Esenwein, 141 Pa. Super. Ct. 604. The adjudication against Petitioner at 141 Pa. Super. Ct. 604, was dated October 4th, 1940. Eight months later, to-wit, on June 23rd, 1941 (R. 22), he first "became a resident of Las Vegas, Clark County, Nevada", for the purpose of there instituting another action against Respondent in divorce. Nevada law required a preliminary six weeks residence; and precisely six weeks to the day, to-wit, on August 5th, 1941 (R. 11), Petitioner filed his "Complaint" in divorce in Nevada.

Petitioner, in his Brief (page 17) says:—

> ". . . The issue of acquisition of domicil was not raised in the County Court".

Petitioner in his said Brief also says (page 7, Par. 3rd):—

> "The *only real* issue or defence raised by the wife in the County Court was that of res adjudicata." (Italics ours)

Both statements are incorrect. The Answer of the Respondent (R. 28, Par. Sixth), to Petitioner's Petition for Revocation of the Support Order in the County Court, charged fraud,—"that the proceedings in Nevada . . . were conceived and executed in fraud both upon the States and Courts of Nevada and Pennsylvania". (See Andrews v. Andrews, 188 U. S. 14 (1902), ". . . practising a fraud upon the laws of the State of their domicile, that is, to procure

a divorce without obtaining a bona fide domicile in such other state.")

The testimony read into the record in the County Court (R. 42), contradicted that appearing in the Nevada exemplification (R. 22) (R. 43), and exposed the fraud. The admission by Petitioner's counsel in open Court (R. 55), that Petitioner left Nevada immediately after obtaining his divorce, further supported said charge.

Petitioner in his Brief (page 47) says:—

> "That court, however, undertook to pass upon the questions of jurisdiction and domicil. These questions were raised *by the court itself.*" (Italics ours)

This statement is incorrect: (R. 28, Par. Sixth; R. 42).

The Brief of Respondent in the Superior Court of Pennsylvania contained an entire section (VII), entitled, "DID THE NEVADA COURT HAVE JURISDICTION EITHER OF THE PARTIES OR OF THE CAUSE OF ACTION?", covering nine pages, beginning at page 27 in said Brief. This dealt with the charge of fraud, failure of the animus manendi, to-wit, the obtaining of a divorce in Nevada without the intention to establish a bona fide domicile in Nevada. This was especially called to the attention of Petitioner's counsel by Judge KENWORTHEY from the Bench, during the oral argument in the Superior Court.

The burden of Petitioner's argument in his Brief (p. 22), *which argument raises no Federal question*,—is that had Petitioner been aware that the Nevada jurisdiction was being challenged, he "could have shown 'the conditions' which developed immediately afterward." To this Respondent replies:

(1) Petitioner was perfectly well aware that the Nevada jurisdiction was being challenged in the County Court, (R. 28, Par. Sixth; R. 42 versus R. 43).

The Nevada jurisdiction was a subject of open argument and discussion during the Hearing in the County Court (R.

30). At the bottom of page 37 in the Record (R. 37) appears the following:

> "Mr. Watts: I wish to ask if counsel for the prosecutrix considers that the divorce granted by the Nevada court was legal and valid in the State of Nevada?
>
> "Mr. Seligsohn: That pretended divorce which is in the Exemplification which you have exhibited to this court today, Mr. Watts, and the Decree in that divorce is, in my opinion, absolutely invalid in Nevada for the reason that the Court in Nevada did not, at any time, have *jurisdiction* of the parties or of the subject matter, because the law of Nevada requires two things: First, the necessary six weeks residence in the County where the complaint is brought, before the complaint is brought, and in addition thereto *a bona fide intention* to remain in that County . . . (and where) it has been proved by events that the petitioner in that case, *in violation of his pretended, sworn statement, that he intended to remain there in Nevada, came immediately after September 8, 1941 to Cleveland, Ohio*".

This was supported, and the Answer of Respondent charging *fraud* (R. 28, Par. Sixth) was supported by the deposition read into the Record by Respondent (R. 42), thus:—

> "Q. Where do you live, Mr. Esenwein?
>
> A. 2635 North Moreland Boulevard, Cleveland, Ohio.
>
> Q. Mr. Esenwein, how long have you lived at 2635 North Moreland?
>
> A. Since some time in October, 1941". (R. 42)

In regard to jurisdiction and domicile, counsel for Respondent (R. 44 and 45) called the County Court's attention to the cases of Presson v. Presson, 38 Nev. p. 203; Walker v. Walker, 45 Nev. p. 105, relating to the necessity for the animus manendi; and to Andrews v. Andrews, 188 U. S. 14, "relating to residence and jurisdiction" (R. 45).

Petitioner's contention that he was not aware in County Court that jurisdiction was being challenged is contradicted by the Record itself as above pointed out.

VI. THE DECISION IN WILLIAMS v. NORTH CAROLINA, 317 U. S. 287; 63 S. Ct. 207. DID SAID DECISION IN OVERRULING HADDOCK v. HADDOCK, LAY DOWN ANY NEW RULE OF LAW PROHIBITING AN INQUIRY BY THE COURTS OF THE MATRIMONIAL DOMICILE, INTO THE JURISDICTION OF A FOREIGN COURT (NEVADA), WHICH RENDERS A DECREE IN DIVORCE?

The facts: O. B. Williams and Lillie Shaver Hendrix left their respective spouses in the matrimonial domicile of all the parties, to-wit, North Carolina, in May, 1940, and went to Nevada, where on the same day, June 26th, 1940 (exactly six weeks after arrival), each of them filed libels in divorce against their respective spouses back home in the matrimonial domicile. O. B. Williams got his Nevada decree issued on August 26, 1940. Lillie Shaver Hendrix got her decree on October 4th, 1940; and on that same day said two libellants married together, and *immediately returned* to Pineola, N. C. where they lived as husband and wife, and were there indicted for bigamous cohabitation. Defendants were tried and convicted and were given prison sentences. Defendants appealed; the Supreme Court of N. C. upheld the convictions State v. Williams, (220 N. C. 445). Petition for Certiorari to the Supreme Court of the United States allowed; case argued; Opinion at 317 U. S. 287; 63, S. Ct. 207. Under the Rule in the Haddock Case still then in force, the substituted service upon the Respondent spouses who did not submit to the Nevada jurisdiction, nor appear, would make such service invalid in North Carolina, and as far as Respondent spouses were concerned.

North Carolina relied upon Haddock v. Haddock, as to

the matter of bona fide domicile of the defendant-libellants, it appears that this was admitted by North Carolina and therefore not passed upon by this Court. However on account of confusion of issues before the North Carolina jury,—(pointed out by Judge KENWORTHEY, R. 52),—this Court after argument on October 20th, 1942, decided on December 21, 1942,—"The judgment is reversed and the cause is remanded to the Supreme Court of North Carolina for further proceedings not inconsistent with this opinion". On February 24th, 1943 the Supreme Court of North Carolina accordingly vacated its judgment and a new trial was ordered; (24 S. E. 2d, p. 256). At this second trial the clear issue of defendant's bona fide domicile and intention to establish same in Nevada, was placed before the jury. Defendants were again convicted of bigamous cohabitation. It appears that defendants had left Nevada immediately after Lillie Shaver Hendrix had obtained her decree in divorce on October 4th, 1940. The second conviction on the clear issue of domicile in Nevada, shows lack of intention on part of defendants to establish any bona fide domicile in Nevada. Defendants appealed to Supreme Court of North Carolina again, which on April 12th, 1944 affirmed the convictions (224 N. C. 183; 29 S. E. 2d 744). Defendants petitioned this Court for writ of Certiorari which was allowed.

Petitioner argued in the Superior Court of Pennsylvania, that since the Williams et al v. N. C. decision, there is a "new rule of law" (p. 7, top, Appellant's Original Brief in Superior Court). His position is still the same. Petitioner at page 26 of his Brief for Petitioner speaks of an alleged "aversion *to the new rule of law*", supposedly, and according to Petitioner, entertained by the "Pennsylvania appellate courts". According to Petitioner this alleged and supposed "new rule of law", has "definitely shattered" Bell v. Bell, 181 U. S. 175, Streitwolf v. Streit-

wolf, 181 U. S. 179 and Andrews v. Andrews, 188 U. S. 14, "as present day authorities"; (Page 7 of Petitioner's Petition for Writ of Certiorari in this case).

There is absolutely no reasoning or argument for this proposition whatever.

The entire case of Petitioner rests upon his theory that the case of Williams v. N. C. lays down a "new rule of law" which *prohibits inquiry* into the bona fides of Domicile of any libellant, (that is, inquiry as to jurisdiction), in a case where the libellant has sought a foreign forum within which to bring his action in divorce, even though the libellant openly admits that he went from the matrimonial domicile (Pennsylvania), to the foreign State (Nevada), purposely to obtain a divorce, and, in fact, left that State (Nevada) *immediately* after obtaining his decree.

The position of Petitioner is (Brief for Petitioner, p. 23), that the Nevada decree is not subject to attack in Pennsylvania. We have covered this ground above under the heading (I (a)) "WAS THE NEVADA DECREE SUBJECT TO COLLATERAL ATTACK?"

At the argument in the Superior Court of Pennsylvania, the Petitioner openly took the position that he had a right to go to Nevada, stay there just long enough to get his Decree and to leave at once thereafter, in spite of his testimony in Nevada (R. 22), that he intended to remain in Nevada, Clark County, as his "permanent place of residence" (R. 22; R. 43).

Petitioner, in the Courts below, and at present, has never been specific, and has never defined the alleged new rule of law supposed, according to him, to have been established by the Decision in Williams v. N. C., but has implied, without undertaking to so state, that the Decision in Williams v. N. C., in overruling Haddock v. Haddock, (201 U. S. 562), has laid down a new rule of law *prohibiting* an inquiry by the Court of the matrimonial domicile, into the jurisdiction of the foreign Court (Nevada), which renders a decree in divorce. This was and is Petitioner's position; (Petitioner's Brief, p. 26).

Examination of the Opinion in Williams v. N. C. discloses absolutely no basis for assuming that any new rule of law was announced prohibiting inquiry into the jurisdiction of the foreign Court.

We contend that this Court did not take under consideration, nor did it decide, the issue of domicile in Nevada—nor was said issue even before this Court in said Williams Case; nor did this Court fix any rule whatever prohibiting inquiry into the bona fides of ANY libellant's domicile. Findings of "domicile" appearing on the face of the record of a foreign Court (Nevada), remain in exactly the same status as BEFORE the Williams v. N. C. decision, i.e., such findings are still open.

> "A bona fide domicile being a jurisdictional fact, its existence is subject to challenge before the Courts of other States, notwithstanding a finding of 'residence' or 'domicile' upon the divorce record". (Prof. Lorenzon; Vol. 52 Yale Law Journal, p. 353).
>
> Bell v. Bell; 181 U. S. 175; 21 S. Ct. 551 (1901);
>
> Andrews v. Andrews, 188 U. S. 14; 23 S. Ct. 237 (1902);
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> Thompson v. Whitman, 18 Wallace, 457 (1873);
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> Bowditch v. Bowditch, 314 Mass. 410; 50 N. E. 2d 65;
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> Noffsinger v. Noffsinger, 50 Fed. Supp. 810, 814;
>
> Fyock's Estate, 135 Pa. 522;
>
> Hein's Estate, 22 Pa. Super. Ct. 31;
>
> Commonwealth v. Yarnell, 313 Pa. 244, 251.
>
> "There is no doubt of the power of the courts below to inquire into the jurisdictional facts necessary to confer jurisdiction on the Nevada Court"; (R. 60)
>
> (Opinion Supreme Court of Pennsylvania; LINN, J), 349 Pa. 451; 35 At. 2d 335;
>
> 48 Dickinson Law Review, 112, Vol. X, No. 4, April, 1944, discussion and list of cases therein cited, including Esenwein, case at bar.

The *fact of bona fide domicile* WAS ADMITTED BY THE STATE OF NORTH CAROLINA, and *it was not found either as a fact or as a matter of law* by this Court in the Williams Case.

In the Williams Case, his Honor Mr. Justice DOUGLAS who delivered the Opinion of this Court, said:—

> "Nor do we reach here the question as to the power of North Carolina to refuse full faith and credit to Nevada divorce decrees because, contrary to the findings of the Nevada court, North Carolina finds that no bona fide domicile was acquired in Nevada."

North Carolina did *not* find that no bona fide domicile was acquired; on the contrary, North Carolina *admitted* actual, i.e., bona fide domicile in Nevada of the defendants in said Williams Case.

Therefore, the question of bona fide domicile of libellants in the Williams Case did not arise, and was not considered nor decided in Mr. Justice Douglas's Opinion of the Majority of this Court.

Mr. Justice Douglas in the Opinion also said:

> "In the first place *North Carolina does not seek* to sustain the judgment below on that ground" (i.e., lack of Nevada domicile). "Moreover *it admits that there is probably enough evidence in the record that petitioner be considered 'to have been actually domiciled in Nevada'*". (Italics ours)
>
> Williams v. N. C. Vol. 317 U. S. p. 291.

> "According to the majority opinion written by Mr. Justice DOUGLAS, *the issue of domicile was not before the Court.* The only question, therefore, was whether a divorce granted in Nevada upon constructive service to a persons *admittedly domiciled* in the state could be denied recognition by North Carolina." (Italics ours)
>
> (Prof. Lorenzon: 52 Yale Law Journal, p. 344; March 1943.)

Williams v. N. C. granted no immunity against the firmly established legal right to challenge the jurisdiction of the foreign (Nevada) Court. There still remains the freedom to inquire into the jurisdiction of the foreign court, as before the Williams Case.

Where the husband was NOT a bona fide resident of Pennsylvania, "a decree of divorce obtained in the state of Pennsylvania *in which neither party is domiciled*, upon service by publication and in *another* state, is entitled to no faith and credit in *that* State:" (Bell v. Bell, 181 U. S. 175; 21 S. Ct. 551 (1901).

> "He (Mr. Justice DOUGLAS) painstakingly pointed out that the Court was NOT OVERRULING Bell v. Bell": (R. 53). (Judge KENWORTHEY, Opinion, Superior Court of Pennsylvania).

The Williams Case decided:—(1) As to the domicile of the defendants in that case in Nevada, not considered and therefore not decided because ADMITTED by North Carolina; (2) As to the jurisdiction of the Nevada Court over the persons of the respondent spouses in North Carolina, it was held that, as to the matter of substituted service (overruling Haddock v. Haddock), that the service on the respondent spouses was valid.

But it must not be forgotten that this Nevada mode of substituted service upon the respondents in North Carolina, *depended in the first place for its breath of life* upon the actual and bona fide *domicile* of the libellants *in Nevada*, and that this all-important element was ADMITTED by the State of North Carolina; and that by virtue of this admission, the Nevada Court was considered to have acquired jurisdiction, *and not otherwise*. Without jurisdiction to begin with, we would never arrive at any question of service, we would not get that far.

In the case at bar the Petitioner left Nevada immediately after obtaining his divorce (R. 55); he is living in Cleveland, Ohio only a few weeks after he swore he intended

to remain a permanent resident of Nevada (R. 6. Par. Seventh; R. 22; R. 43). He had no intention of establishing a bona fide domicile in Nevada. The Nevada Court therefore had no jurisdiction,—the animus manendi was lacking. Therefore *whether or not* Haddock v. Haddock was *overruled* is *entirely immaterial to the Petitioner in this case.*

Conclusion: What did the Williams Case decide? We quote from the Opinion of the Superior Court of Pennsylvania, by Judge KENWORTHEY (R. 52):—

> "It held that IF plaintiff in a divorce proceeding acquires a bona fide domicil in the state which grants him a divorce, the decree is entitled to full faith and credit. This did not in the least impair the authority of the earlier decision in Bell v. Bell, that domicil, not merely the residence, of one of the parties (there the plaintiff), must be established to support a binding decree where there is substituted service." (Italics and emphasis ours)

Jurisdiction is always open to collateral attack and may be based solely upon the face of the proceedings of the foreign court, *without resorting to extrinsic proof*, i.e., from an inspection of the record itself; (R. 42-43; R. 6, Par. Seventh; R. 22; R. 55).

O'Donoghue v. Boies, 159 N. Y. p. 99; 63 N. E. 537.

VII. NO SUBSTANTIAL FEDERAL QUESTION IS INVOLVED.

Conclusion: The claim of Petitioner as set forth in his Brief for Petitioner (p. 36), that, "A Substantial Federal Question is Involved", evades completely the primary, fundamental question in limine, of bona fide domicile, and of real intention to establish such a domicile in Nevada. That is the real question in this case: it is a question of

fact, and the facts are admitted; (R. 55, Opinion; R. 6, Par. 7th; R. 22; R. 42).

No Federal question is involved.

Respectfully submitted,

J. THOMAS HOFFMAN,
JACOB SELIGSOHN,
N. J. LIPPARD.

SUPREME COURT OF THE UNITED STATES.

No. 20.—October Term, 1944.

William F. Esenwein, Petitioner, *vs.* Commonwealth *ex rel.* May H. Esenwein. } On Writ of Certiorari to the Supreme Court of the State of Pennsylvania.

[May 21, 1945.]

Mr. Justice Frankfurter delivered the opinion of the Court.

This case involves the same problem as that which was considered in *Williams* v. *North Carolina*, No. 84, decided today. There are minor variations of fact, but the considerations which controlled the result in the *Williams* case govern this.

Petitioner and respondent were married in Pennsylvania in 1899. They separated in 1919 but continued to live there. The wife, respondent, obtained a support order in the Pennsylvania courts which was modified from time to time. Twice the petitioner sought a divorce in Pennsylvania and failed. In 1941 he went to Nevada, arriving at Las Vegas on June 23rd. Six weeks later, promptly within the minimum period allowed by Nevada law, he there filed a suit for divorce. It was granted September 8th. Shortly thereafter, early in October, he left Nevada and took up his residence in Cleveland, Ohio, where he made his home. On February 1, 1943 petitioner filed an application before the County Court for Allegheny County, Pennsylvania, for total relief from the support order. [illegible]id so on the basis of the decision in *Williams* v. *North Carolina*, 317 U. S. 287, which had been decided on December 21, 1942. Exemplified copies of the Nevada proceedings, with other relevant evidence, were submitted to the County Court, which, after argument, denied the application. Its decision was affirmed by the Superior Court on the ground that petitioner did not have a *bona fide* domicil in Nevada when he obtained his decree of divorce. 153 Pa. Super. 69, 33 A. 2d 675. This was sustained by the Supreme Court of Pennsylvania, 348 Pa. 455, 35 A. 2d 335, and we then granted certiorari. 322 U. S. 725.

Since, according to Pennsylvania law, a support order does not survive divorce, *Commonwealth* v. *Parker*, 59 Pa. Super. 74;

Commonwealth v. *Kurniker*, 96 Pa. Super. 553, the efficacy of the Nevada divorce in Pennsylvania is the decisive question in the case. The facts relating to domicil are not essentially different from those set forth in *Williams* v. *North Carolina*, No. —, *ante*, except that petitioner, instead of staying in an auto court, lived in a hotel and did not return to Pennsylvania, his domiciliary state before he came to Nevada, but went to Ohio.

The Full Faith and Credit Clause placed the Pennsylvania courts under duty to accord *prima facie* validity to the Nevada decree. The burden is on the litigant who would escape the operation of a judgment decreed in another State. Pennsylvania recognized that burden, but its courts were warranted in finding that the respondent sustained her burden of impeaching the foundation of the Nevada decree on the jurisdictional prerequisite of *bona fide* domicil. The Pennsylvania Supreme Court rightly indicated that if merely the Nevada decree had been in evidence, it was entitled to carry the day. But the Supreme Court found that on the entire showing there was convincing countervailing evidence to disprove petitioner's intention to establish a domicil in Nevada. The Pennsylvania courts have viewed their Constitutional duty correctly. It is not for us to retry the facts, and we cannot say that in reaching their conclusion the Pennsylvania courts did not have warrant in evidence and did not fairly weigh the facts.

Petitioner makes a subsidiary claim which need not detain us long. He asserts that he had no notice that the Nevada domicil was to be put in issue, and that therefore it was unfair to decide that question on this record. He points to the fact that for its decision the County Court relied on the Pennsylvania denials of divorce as *res judicata*, whereas the appellate courts rested their decisions on the issue of domicil. Since the record does not support the basis of this claim, we are relieved from considering its legal significance. The issue of domicil was appropriately pleaded in defense, it was contested at the trial, and before the Superior Court petitioner filed a supplemental brief on that issue. A claim of deprivation of opportunity to be heard on the question of domicil before the Pennsylvania courts is without merit.

Affirmed.

Mr. Justice DOUGLAS, concurring.

I think it is important to keep in mind a basic difference between the problem of marital capacity and the problem of support.

We held in *Williams* v. *North Carolina*, 317 U. S. 287, that a Nevada divorce decree granted to a spouse domiciled there was entitled to full faith and credit in North Carolina. That case involved the question of marital capacity. The spouse who obtained the Nevada decree was being prosecuted in North Carolina for living with the one woman whom Nevada recognized as his lawful wife. Quite different considerations would have been presented if North Carolina had merely sought to compel the husband to support his deserted wife and children, whether the Nevada decree had made no provision for the support of the former wife and children or had provided an amount deemed insufficient by North Carolina. In other words, it is not apparent that the spouse who obtained the decree can defeat an action for maintenance or support in another State by showing that he was domiciled in the State which awarded him the divorce decree. It is one thing if the spouse from whom the decree of divorce is obtained appears or is personally served. See *Yarborough* v. *Yarborough*, 290 U. S. 202; *Davis* v. *Davis*, 305 U. S. 32. But I am not convinced that in absence of an appearance or personal service the decree need be given full faith and credit when it comes to maintenance or support of the other spouse or the children. See *Pennoyer* v. *Neff*, 95 U. S. 714. The problem under the full faith and credit clause is to accommodate as fully as possible the conflicting interests of the two States. See *Magnolia Petroleum Co.* v. *Hunt*, 320 U. S. 430, 447 (dissenting opinion). The question of marital capacity will often raise an irreconcilable conflict between the policies of the two States. See *Williams* v. *North Carolina, supra.* One must give way in the larger interest of the federal union. But the same conflict is not necessarily present when it comes to maintenance or support. The State where the deserted wife is domiciled has a deep concern in the welfare of the family deserted by the head of the household. If he is required to support his former wife he is not made a bigamist and the offspring of his second marriage are not bastardized. In that view Pennsylvania in this case might refuse to alter its former order of support or might enlarge it, even though Nevada in which the other spouse was domiciled and obtained his divorce made a different provision

for support or none at all. See Radin, The Authenticated Full Faith and Credit Clause, 39 Ill. L. Rev. 1, 28.

Mr. Justice BLACK joins in this opinion.

Mr. Justice RUTLEDGE, concurring.

In accordance with the views which I have expressed in *Williams* v. *North Carolina*, No. 84, decided this day, I do not think full faith and credit have been given by the Pennsylvania courts to the Nevada decree in this case. But upon the basis of the Court's decision in that case, made applicable also in this one, I concur in the result. In doing so, however, it is appropriate to indicate my agreement with the views expressed in the concurring opinion of Mr. Justice Douglas that the jurisdictional foundation for a decree in one state capable of foreclosing an action for maintenance or support in another may be different from that required to alter marital status with extraterritorial effect.